Supreme Court, U.S.
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No. -

IN THE

Supreme Court of the United States

JAMES H. ROANE, JR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL F. ENZINNA
Counsel of Record
HEATHER M. MCCANN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a district court's failure to give the unanimity instruction required by *Richardson* v. *United States*, 526 U.S. 813 (1999)—that the jury must unanimously agree on the specific violations that make up the "continuing series of violations" necessary for a continuing criminal enterprise ("CCE") conviction—may be excused as nonprejudicial whenever the jury finds the defendant guilty of three or more predicate crimes.

2. Whether, to convict a defendant of engaging in a continuing criminal enterprise, the jury must unanimously agree on the identities of five or more persons the defendant managed or supervised.

3. Whether petitioner received ineffective assistance where counsel's investigation of his alibi defense to a critical capital charge—that petitioner was at a hotel miles away when the victim was killed—was limited to a cursory search for objective evidence like hotel records where: (1) counsel had "substantial information" that petitioner's alibi was credible (including a disinterested eyewitness who insisted that petitioner was not the killer, petitioner's detailed account of his alibi, which was made more credible by petitioner's candor regarding other charges, and a witness who corroborated petitioner's account); (2) a post-conviction investigator was able to locate the objective evidence supporting petitioner's alibi in just three hours; (3) counsel's search was not restricted by limits on time or resources; and (4) the objective evidence would have significantly bolstered petitioner's misidentification defense on the sole count on which he was sentenced to death.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner James H. Roane, Jr., was defendant-appellant and defendant-appellee in the court of appeals, and a defendant in the district court. Cory Johnson and Richard Tipton were defendants-appellants in the court of appeals, and defendants in the district court. Respondent, the United States of America, was the plaintiff-appellant and plaintiff-appellee in the court of appeals, and the plaintiff in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James H. Roane, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-43a) is reported at 378 F.3d 382 (4th Cir. 2004). The opinions of the district court (Pet. App. 44a-63a and 64a-188a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 9, 2004. Timely petitions for rehearing and rehearing en banc were denied on October 5, 2004 (Pet. App. 189a-190a). On December 16, 2004, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to

and including February 2, 2005, and on January 24, 2005, the Chief Justice again extended the time for filing a petition for a writ of certiorari, this time to and including February 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Sixth Amendment to the United States Constitution and of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*, are set forth in the Appendix at Pet. App. 193a-195a.

STATEMENT

In *Richardson* v. *United States*, 526 U.S. 813 (1999), this Court held that, to convict a defendant of participating in a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848, the jurors must unanimously agree on the identity of the three or more related, predicate crimes that support conviction. This capital case concerns how federal courts should analyze whether a defendant suffered prejudice where the trial court, contrary to *Richardson*, fails to instruct jurors on the unanimity requirement. It also raises a significant and recurring question regarding the investigation that counsel must conduct in a capital case and the degree of deference owed to the district court in resolving ineffective assistance claims.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner James H. Roane, Jr. ("Roane") was convicted of, among other things, conspiracy to possess cocaine base with intent to distribute it in violation of 21 U.S.C. § 846; five counts of committing acts of violence in aid of racketeering activity in violation of 18 U.S.C. § 1959; four counts of using a firearm in relation to a crime of violence or a drug trafficking offense in violation of 18 U.S.C. § 924(c); and one count of possession of cocaine base with intent to distribute it in violation of 21

U.S.C. § 841(a)(1). Roane was also convicted of engaging in a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848, including three potentially capital counts of killing in connection with a CCE in violation of 21 U.S.C. § 848(e). He was sentenced to death for one of the CCE homicides, the murder of Douglas Moody, the only homicide in which he was alleged to be the triggerman. C.A. App. 296; see *id.* at 281-286 (jury recommendations). For the other convictions, he received a sentence of life imprisonment plus 65 years. *Id.* at 296. His convictions and sentences were affirmed in relevant part on direct review. *United States* v. *Tipton*, 90 F.3d 861, 885 (4th Cir. 1996).

Roane sought relief from his conviction and sentence on various grounds under 28 U.S.C. § 2255. Finding that Roane had received ineffective assistance of counsel in connection with the investigation of the Moody homicide, the United States District Court for the Eastern District of Virginia granted Roane's motion for relief from the conviction and death sentence arising from that crime. Pet. App. 44a-63a. However, it denied relief with respect to Roane's other claims, as well as the claims of Roane's co-defendants. *Id.* at 64a-198a. The Fourth Circuit affirmed the district court's decision to deny relief on the other claims, and reversed the district court's grant of relief for the convictions arising from the murder of Douglas Moody. Pet. App. 1a-43a.

1. **Defense counsel's pretrial investigation.** In July of 1992, a grand jury returned a 33-count indictment charging Roane and others with various crimes arising out of drug trafficking operations in and around Richmond, Virginia. The indictment charged that Roane's co-defendants Richard Tipton and Cory Johnson engaged in a "continuing criminal enterprise," 21 U.S.C. § 848, by acting as "partners" in a drug trafficking conspiracy, which began in Trenton, New Jersey, and spread to Richmond, Virginia. Pet. App. 3a. Roane allegedly became involved in the

conspiracy in late 1991. According to the government, the conspiracy involved the distribution of crack cocaine through a network of "workers," and served as the vehicle through which the defendants committed various crimes alleged in the indictment. Most important for present purposes, one of those crimes—the crime for which Roane was ultimately sentenced to death—was the January 1992 murder of Douglas Moody. Moody was shot twice and then stabbed to death as he attempted to flee his assailants. The Moody killing was the only one Roane was alleged to have committed with his own hands.

Before trial, Roane conceded to his counsel that he was involved in many of the crimes with which he was charged. Nonetheless, he consistently denied any involvement in Moody's killing. Pet. App. 49a. According to Roane, he was miles away in a Richmond hotel with Sandra Reavis when Moody was killed. *Ibid.* Roane further advised his attorney that Linwood Chiles and Carmela Cooley had driven him and Reavis to the hotel, and that Chiles had registered and paid cash for the room. *Ibid.*

To confirm Roane's alibi, Roane's trial counsel contacted Cooley. She confirmed that she had accompanied Roane, Reavis, and Chiles to the hotel, but could not specify the date. Pet. App. 50a. Roane's lawyer briefly sought to obtain hotel records which could have confirmed Roane's alibi. However, when that effort "did not readily yield" results, trial counsel "simply terminated the investigation" and "discarded [Roane's] alibi defense." *Id.* at 56a. Years later, after Roane was sentenced to death, an investigator (spending just three hours at the hotel) would locate hotel records corroborating Roane's alibi. *Id.* at 50a-51a.

2. **Trial and appeal.** At trial, there was divided eyewitness testimony as to who killed Moody. Two alleged "workers" in the distribution network, Denise Berkley and Priscilla "Pepsi" Greene, testified against petitioner. Berkley testified that, near midnight on January 13, 1992, she

was smoking crack cocaine at a building on the corner of Clay and Harrison streets when she heard a gunshot, followed by the breaking of a window. Pet. App. 47a. Berkley testified that, after disposing of her drugs, she ran outside and saw Roane repeatedly stab Moody. *Ibid.* Greene testified that she was standing on the corner of Clay and Harrison when she heard gunshots. *Id.* at 48a. According to Greene, after Roane and Tipton left the building, Roane directed her to retrieve a knife that he had stored at another alleged conspirator's residence. *Ibid.* Greene testified that Roane returned the knife to her later that night and instructed her to dispose of it. *Id.* at 48a-49a.

Berkley readily admitted that she was smoking crack cocaine at the time the events transpired, C.A. App. 4424, and that she received compensation from the government in connection with her cooperation, *id.* at 4487-4488. Greene's testimony was substantially impeached. She had been shot in the head after Moody's murder. When initially questioned by the police, she stated that she remembered nothing about the killing. Only after repeated interviews by the police did Greene's memory "improve." *Id.* at 2585.

Gina Taylor testified in Roane's defense. Taylor was a student who lived next door to the house where Moody was killed. Pet App. 49a. She was not involved in drug dealing or any other illegal activity, and had attempted to revive Moody following the attack. Although Taylor admitted to "kind of" having dated Tipton at one point, the district court found that, with respect to Roane, she was "an apparently disinterested eyewitness." Pet. App. 49a, 55a. Taylor testified that she witnessed the murder and told the police that Roane was not the killer. *Id.* at 49a.

Consistent with Taylor's testimony and other evidence, the Richmond police confirmed that they had originally focused on another suspect who had previously threatened Moody. In particular, a Richmond police officer testified that the original suspect in the case was someone named

Keith, who matched Taylor's description of the killer, and who had threatened Moody. *Ibid.* Indeed, "[t]wo hours before Moody was murdered, Keith had come to Moody's mother's house looking for him." *Ibid.* One week before that, moreover, "Keith's friends, armed with machine guns, had kicked in the door of Moody's mother's residence while attempting to find Moody." *Ibid.*

Following the presentation of evidence, the trial court declined to give the jurors a unanimity instruction with respect to the identity of the predicate crimes underlying the CCE charges. To establish a CCE violation, the government must prove (among other things) that the defendant committed a drug-related felony, as part of a "continuing series of violations," in concert with five or more persons under his supervision. Likewise, the jurors were never told that they had to agree unanimously on the identity of the three, sufficiently related predicate crimes that make up the requisite "continuing series." The jurors never heard about Roane's alibi for the Moody killing; nor did they see the corroborating hotel records. The jury found Roane guilty on all charges, including three counts of killing in connection with a continuing criminal enterprise in violation of 21 U.S.C. § 848(e). After considering aggravating and mitigating circumstances during the penalty phase, the jury recommended that Roane be sentenced to death *only* for the killing of Douglas Moody. C.A. App. 281-286. For the other killings, the jury recommended a sentence of life imprisonment. The trial court accepted the jury's recommendations. *Id.* at 293.

On direct appeal, the Fourth Circuit affirmed in part and reversed in part. The court of appeals reversed Roane's conviction under 21 U.S.C. § 846 on double jeopardy grounds. *Tipton*, 90 F.3d at 868. The court of appeals, however, rejected Roane's contention that the trial court had erred in failing to instruct the jury that, to convict Roane of engaging in a CCE, it must unanimously agree on at least

three related predicate acts constituting the "continuing series of violations" under 21 U.S.C. § 848(c)(2). Whether or not such an instruction was required, the court of appeals held that Roane was not prejudiced because the jury had unanimously found him guilty of more than three predicate violations, charged as separate offenses. *Tipton*, 90 F.3d at 885. This Court denied Roane's petition for a writ of certiorari on June 2, 1997. 520 U.S. 1253.

3. **The Section 2255 motion.** Roane then filed a motion for relief under 28 U.S.C. § 2255. Shortly before Roane filed that motion, this Court decided *Richardson* v. *United States*, 526 U.S. 813 (1999), holding that the jury in a CCE prosecution must unanimously agree that the defendant committed a "continuing series of violations," *and* on the identity of the related violations that make up that "continuing series." 526 U.S. at 824. Relying on *Richardson*, Roane reasserted his claim that the trial court had erred in failing to give a special unanimity instruction. Roane further argued that *Richardson* error is structural, obviating any need to show prejudice. In the alternative, Roane asserted that he had shown prejudice. The district court rejected those arguments. Pet. App. 83a.

In addition, Roane urged that his trial counsel, David Baugh, had rendered ineffective assistance by, *inter alia*, failing adequately to investigate Roane's alibi for the murder of Douglas Moody. After an evidentiary hearing, the district court agreed with Roane. Pet. App. 44a-63a. The court observed that, before trial, Roane had advised his lawyer of his alibi—that he was at a hotel several miles from the murder scene at the time of the murder—and that his lawyer "was convinced that Roane did not participate in the Moody murder." Pet. App. 49a. Roane told his lawyer that, on the night Moody was killed, Roane had gone to a hotel with Sandra Reavis, Linwood Chiles and Carmela Cooley; that Chiles had registered for the room; and that Chiles had paid cash. *Ibid.*

The district court found that there was "substantial information that indicated that Roane's claim that he was at a hotel at the time of the Moody murder was credible." Pet. App. 55a. The district court explained:

> First, counsel had the testimony of an apparently disinterested eyewitness, Gina Taylor, who insisted that Roane did not commit the murder. Second, counsel had the detailed account of the alibi from his client. Roane's candor with counsel regarding his other criminal acts assured counsel that the alibi was true. Third, counsel's initial investigation corroborated the details of the account provided by Roane. Although Carmella Cooley could not provide a specific date, she confirmed to counsel that she had accompanied Roane and Reavis to a hotel. With all this information in hand, *counsel had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story.* Under such circumstances, counsel was obliged to thoroughly review the hotel's records to determine whether they could yield support for an alibi defense.

Ibid. (emphasis added).

Roane's trial counsel, however, "did not follow through and seek the records with the vigor demanded by the situation." Pet. App. 56a. Although Roane's counsel did go to the hotel to request records that might have corroborated Roane's alibi, he limited his efforts to records from the night of Moody's murder (January 12, 1992) containing the name "Linwood Chiles." The resulting review was "very limited in scope and duration." *Ibid.* When that "did not readily yield [the corroborating evidence], counsel simply terminated his investigation, discarded the alibi defense and concentrated on the misidentification defense." *Ibid.* In contrast, when an investigator hired by Roane's post-conviction counsel conducted a search of the hotel records six years later, he discovered hotel records corroborating

Roane's alibi after just three hours of review. He found a hotel registration card for the night of January 12, 1992, under the name "Chiles, Larry," as well as a receipt for that night indicating that Chiles had paid cash for the room—confirming that Chiles had rented a room at the hotel on the night of Moody's murder, precisely as Roane had reported. *Ibid.*

The district court concluded that trial counsel's failure to find those documents was "attributable to the unreasonably limited amount of time and resources counsel devoted" to the investigation. Pet. App. 57a. The court reasoned that, given the potentially critical nature of the records and the strong reasons for believing in their existence, "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* at 56a. Here, counsel did neither, conducting only a "very limited" review of hotel records. *Ibid.* Nor was there justification for conducting such a limited review: "Neither [trial counsel] nor the record," the district court found, "suggest that constraints of time or resources played a part in [counsel's] decision to terminate his search for records corroborative of Roane's alibi." *Ibid.*

The district court, moreover, found that Roane was prejudiced by his counsel's inadequate investigation. Among other things, trial counsel had advised Roane not to testify absent objective confirmation of his alibi defense. Pet. App. 57a. If counsel had located the records, however, "Roane would have testified" in his own defense, asserting "that he was at the hotel at the time of the murder of Douglas Moody." *Ibid.* That testimony, in turn, "would have been somewhat corroborated by the introduction of the hotel records." *Id.* at 57a-58a. Particularly when weighed against the proof at trial, that additional evidence was suf-

ficient to create a reasonable probability of a different outcome. *Id.* at 58a. The eyewitness testimony at trial was divided, and there were significant difficulties with the government's witnesses, Denise Berkley and Pepsi Greene. *Ibid.*; see pp. 4-6, *supra*. Under the circumstances, "the foregoing alibi evidence would have bolstered Roane's plausible misidentification defense and is of sufficient credence to create a reasonable probability that Roane would have been acquitted of the charges related to the murder of Douglas Moody." Pet. App. 58a.[1]

In a separate opinion, the district court rejected all of Roane's other claims under Section 2255. Pet. App. 64a-189a. In the same opinion, the district court also rejected all of the Section 2255 claims of Roane's co-defendants, Tipton and Johnson, who had been sentenced to death for their roles in several killings in connection with the CCE. *Ibid.*

4. **The court of appeals' decision.** The Fourth Circuit affirmed in part and reversed in part. With respect to Roane's claim under *Richardson*, the court of appeals held that the trial court's failure to instruct the jury on the need for unanimity on the identity of the three related predicate offenses supporting the "continuing series" element of 21 U.S.C. § 848(c) had caused Roane no prejudice. The court of appeals reasoned that it had rejected the same claims on direct review (before *Richardson* was decided) "assuming that unanimity was required," as this Court later "confirmed" in *Richardson*. According to that prior decision, Roane could not have suffered "actual prejudice from the lack of a special unanimity instruction because, '[b]y its

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[1] In the same opinion, the district court rejected Roane's claim of actual innocence. Pet. App. 59a-62a. While the evidence was sufficient to create a reasonable probability of a different outcome before a jury, it was not so overwhelming that "no reasonable juror would have convicted Roane of the offenses related to the murder of Douglas Moody." *Id.* at 63a.

verdict, it is clear that the jury unanimously found [Roane] guilty of at least five predicate violations * * * .'" Pet. App. 19a (quoting *Tipton*, 90 F.3d at 885). The court of appeals adhered to that conclusion in this case. The court likewise rejected Roane's contention that the failure to provide the unanimity instruction required by *Richardson* is structural error. Citing its earlier decisions in *United States* v. *Stitt*, 250 F.3d 878, 883 (4th Cir. 2001), and *United States* v. *Brown*, 202 F.3d 691, 699 (4th Cir. 2000), the court held that "a trial court's failure to give a *Richardson* instruction is a procedural defect rather than a structural one." Pet. App. 20a. The Fourth Circuit also affirmed the district court's decision to reject each and every one of Tipton's and Johnson's challenges to their convictions and sentences. Pet. App. 17a-18a, 21a-39a.

With respect to the district court's ruling that Roane's trial counsel had rendered ineffective assistance in connection with the Moody killing, the Fourth Circuit reversed, reinstating the convictions and associated sentence of death. Pet. App. 39a-43a. The court of appeals did not dispute that trial counsel had "reason to believe that the hotel records could generate an alibi for Roane," and that he "was therefore obliged to make a reasonable investigation of them." *Id.* at 40a. But the court of appeals concluded that trial counsel's investigation, even if limited, was constitutionally adequate. The court explained that trial counsel had interviewed the potential alibi witnesses, called the hotel to ask for records, and had gone to the hotel to review records before giving up on the alibi and focusing solely on misidentification instead. *Id.* at 42a. The court of appeals did not address the amount of time or effort counsel actually spent reviewing the hotel records. But it concluded that counsel's defense, on the whole, was constitutionally adequate. *Id.* at 42a-43a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision in this case holds that a district court's failure to give the unanimity instruction required by *Richardson*—that the jury must unanimously agree on the specific violations that make up the "continuing series of violations" for a CCE conviction—is harmless whenever the jury finds the defendant guilty of three or more predicate violations. That approach conflicts with decisions of the First and Sixth Circuits. Rejecting the contention that *Richardson* error is automatically harmless simply because the jury finds the defendant guilty of more than three predicate offenses, those courts also require proof that a properly instructed jury would have found at least three of the crimes to be sufficiently related to each other so as to form a "continuing" series of violations. The Fourth Circuit's contrary approach turns *Richardson* on its head. It excludes from the prejudice analysis precisely the requirement that *Richardson* established—that the jury agree not only that the defendant committed three or more predicate acts, but that it unanimously agree on *which* predicate acts are *sufficiently related* to each other to form the "continuing series" supporting the CCE conviction. It also overlooks the structural role of the unanimity requirement in the American legal system.

The Fourth Circuit's decision, moreover, improperly sets aside the trial court's finding of ineffective assistance. Time and again this Court has made clear that counsel has a duty to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U.S. 668, 690-691 (1984). In this case, the district court found that counsel had no strategic reason to terminate, after a cursory attempt, the effort to locate the hotel records that surely had to exist and that would have confirmed Roane's alibi for the Moody homicide. The failure to put in the few hours that would have uncovered those records, moreover, was particularly

unreasonable given the critical nature of the Moody homicide charges—they were the only charges for which Roane was accused of personally committing a murder in this capital case. The Fourth Circuit's decision to hold trial counsel's investigation reasonable nonetheless, without identifying any reasonable basis for counsel's decision to terminate his review of critical documents, contravenes this Court's precedents.

A. The Courts of Appeals Are Divided On The Test For Prejudice Arising From *Richardson* Error

Enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, Section 848 of Title 21 of the U.S. Code makes it unlawful for any person to "engag[e] in a continuing criminal enterprise" or "CCE." 21 U.S.C. § 848(a). To establish a violation of the CCE statute, the government must show that the defendant (a) violated a federal felony drug law, and (b) that the violation was part of a "continuing series of violations," undertaken with five or more persons supervised by the defendant, and from which the defendant obtained substantial income or resources. 21 U.S.C. § 848(c); *Garrett* v. *United States*, 471 U.S. 773, 786 (1985). In *Richardson*, this Court held that, to convict a defendant of a CCE violation, the jury must find that "the defendant committed some 'continuing series of violations'" and agree *unanimously* on *which* predicate drug crimes are sufficiently related to make up the "continuing series." 526 U.S. at 815; see, *e.g.*, Sand, Siffert, Loughlin and Reiss, *Modern Federal Jury Instructions* § 6.21.848A, at 8-331 (Mathew Bender 2004) ("You must unanimously agree on which three violations constitute the series of violations") (8th Cir. Criminal Pattern Jury Instructions).

1. This petition concerns the proper test for prejudice where, as here, the jury is not instructed that it must unanimously agree on the identity of the violations that

make up the continuing series. In this case, the Fourth Circuit held that the *Richardson* error could not have caused prejudice because Roane was separately convicted of at least five felonies that qualify as predicate acts—more than the minimum three presumably required under 21 U.S.C. § 848(c)(2). Roane, the court stated, "'could have suffered no actual prejudice from the lack of a special unanimity instruction on the predicate violation element' because '[b]y its verdict, it is clear that the jury unanimously found [him] guilty of at least five predicate violations * * * .'" Pet. App. 19a (quoting *Tipton*, 90 F.3d at 885).

The Second, Fifth, and Tenth Circuits have adopted that same approach, holding that the failure to provide the unanimity instruction required by *Richardson* is automatically harmless whenever the defendant is convicted of three or more crimes that qualify as CCE predicates. See, *e.g.*, *Santana-Madera* v. *United States*, 260 F.3d 133, 140-141 (2d Cir. 2001) (because "the jury unanimously agreed on at least nine major violations," "it is beyond cavil that the jurors would have unanimously agreed on three predicate violations"); *United States* v. *Green*, 293 F.3d 886, 890 (5th Cir. 2002) (error harmless because jury convicted defendant of "the predicate violations"; "implicit in the convictions is the unanimous agreement that [the defendant] was guilty of three specific violations in the CCE series."); *United States* v. *Ross*, 347 F.3d 850, 852 (10th Cir. 2003) ("since the jury unanimously convicted Appellant of four predicate violations, *Richardson*'s requirement—that a jury unanimously agree * * * that the defendant committed each of the individual violations necessary to make up [the] continuing series—is met") (internal quotation marks omitted).

In contrast, the First and Sixth Circuits have held that the prejudice inquiry for *Richardson* violations requires a further inquiry. See *United States* v. *Escobar-De Jesus*, 187 F.3d 148, 162 (1st Cir. 1999); *Murr* v. *United States*, 200

F.3d 895, 906 (6th Cir. 2000). As the First Circuit explained, the fact that the jury unanimously convicted the defendant of more than three predicate acts "is not the end of the matter." *Escobar-De Jesus*, 187 F.3d at 162. Section 848 and *Richardson* "also require[] that the jurors agree that the 'series' of violations be 'continuing' in nature—that is, that they be related to each other in some way." 187 F.3d at 162. Consequently, *Richardson* error can be harmless only if the court concludes "beyond a reasonable doubt that the jury, had it been properly instructed, would have found that at least three of" the counts of conviction "were related to each other." *Ibid.* Accord *Murr*, 200 F.3d at 906 (error harmless if the jury "necessarily made factual findings establishing that the violations were related to one another").

2. The rule of automatic harmlessness applied by the Fourth Circuit in this case, and followed by the Second, Fifth, and Tenth Circuits, cannot be reconciled with *Richardson*. *Richardson*'s fundamental holding is that, to convict a defendant of a CCE violation, jurors must unanimously agree on *the identity* of the predicate offenses constituting the "continuing series." Where the *Richardson* instruction is omitted, the fact that the jury returned guilty verdicts on several underlying crimes along with the CCE conviction does make it clear that each juror concluded that the defendant committed the offenses of conviction and that *some* of those offenses were sufficiently related to support the CCE conviction. But it does not demonstrate that the jurors, if properly instructed, would have agreed on *which* offenses were sufficiently related to make up the "continuing series."

For that reason, this Court has recognized that its holding in *Richardson* "will make a difference where, as here, the Government introduces evidence that the defendant has committed *more underlying drug crimes than legally necessary* to make up a series." 526 U.S. at 818

(emphasis added). The Fourth Circuit's approach sets that observation on its head, holding that *Richardson* makes *no* difference in precisely the same cases—those with more than three predicate convictions.

Congress, moreover, did not "intend[] to substitute the CCE offense for the underlying predicate offenses." *Garrett*, 471 U.S. at 785. Rather, in defining a "continuing criminal enterprise" by reference to a "series of violations," Congress sought to "add a new enforcement tool to the substantive drug offenses" to reach the "top brass" in drug rings. *Id.* at 781, 784. The Fourth Circuit's approach effectively reads the "continuing series" element out of the prejudice inquiry and out of the CCE statute.

3. Finally, the Fourth Circuit overlooked the structural significance of the unanimity instruction in our system of criminal justice. *Richardson* touches on one of the cornerstones of American criminal jurisprudence: the government's obligation to persuade a *unanimous* jury as to each and every element of a crime charged. The requirement of unanimity is part of the framework of our system of criminal justice, *United States* v. *Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978), and "one of the indispensable features of federal jury trial[s]," *United States* v. *Scalzitti*, 578 F.2d 507, 511 (3d Cir. 1978). The right to a unanimous verdict is so critical that it is one of the few rights that cannot be waived in any circumstances. *United States* v. *Ullah*, 976 F.3d 509, 513 (9th Cir. 1992); *United States* v. *Gipson*, 553 F.2d 453, 456 n.4 (5th Cir. 1977). For that reason, *Richardson* error is structural—a "defect affecting the framework within which the trial proceeds"—and requires reversal without inquiry into prejudice. *Neder* v. *United States*, 527 U.S. 1, 8 (1999). The absence of a unanimity instruction "'infect[s] the entire trial process,' and 'necessarily render[s] [the] trial fundamentally unfair.'" *Ibid.* (citations omitted); see, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction).

The Fourth Circuit and other courts of appeals have nonetheless concluded that *Richardson* error is not structural. Pet. App. 20a; *Escobar-De Jesus*, 187 F.3d at 161-162; *Santana-Madera*, 260 F.3d at 139-141; *Lanier* v. *United States*, 220 F.3d 833, 838-839 (7th Cir. 2000); *United States* v. *Rivera*, 347 F.3d 850, 851-852 (10th Cir. 2003). Those courts, however, have proceeded on the assumption that a *Richardson* violation is the functional equivalent of omitting an element of the crime charged, which (under *Neder*) is subject to harmless error analysis. That assumption overlooks the significance of unanimity in ensuring that the results of federal criminal trials are both reliable and fundamentally fair. In any event, even if *Richardson* error is not structural, the critical role of unanimity in our system of criminal justice reinforces the need for any prejudice inquiry to be complete and exacting. The approach adopted by the Fourth Circuit here (unlike that of the First and Sixth Circuits) is not.[2]

B. This Court Should Clarify The Proper Standard Of Deference Owed To District Court Findings On Ineffective Assistance Claims

The Fourth Circuit's decision, moreover, strays from the standards this Court has established for ineffective assistance of counsel claims and improperly disregards the district court's specific factual findings. This Court has instructed that trial counsel has a duty to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U.S. 668, 690-691 (1984). In this case, the

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[2] Roane's co-defendants at trial and co-appellants in the court of appeals, Richard Tipton and Cory Johnson, are filing separate petitions for a writ of certiorari in which they urge that, under *Richardson*, the jury must also unanimously agree on the identity of the five people under the defendant's supervision or management, a claim Roane raised on direct review. Roane joins in those arguments and the remaining contentions raised by Tipton and Johnson.

district court concluded—and made specific findings to support its conclusion—that counsel's investigation of Roane's alibi defense was not reasonable. As the district court explained, counsel had "substantial information" indicating "that Roane's claim that he was at a hotel at the time of the Moody murder was credible." Pet. App. 55a. There was an "apparently disinterested" eyewitness who insisted that Roane was not the killer. *Ibid.* Roane provided a "detailed account of the alibi," explaining that Carmela Cooley and Linwood Chiles had accompanied him to the hotel, and that Chiles had registered for and paid cash for the room. *Ibid.* Counsel's interview of Carmela Cooley "corroborated the details of th[at] account." *Ibid.* Finally, Roane's "candor with counsel regarding his other criminal acts assured counsel that the alibi was true." *Ibid.* Indeed, counsel "was convinced" that Roane was not responsible for the Moody killing. *Id.* at 49a.

Given that information, counsel "had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story." Pet. App. 55a. Yet counsel's review of the hotel records was "very limited in scope and duration." *Ibid.* When his brief search for a registration card under the name Linwood Chiles (but not "Larry Chiles," "L. Chiles," or "Chiles") did "not readily yield [the corroborating evidence], counsel simply terminated his investigation, discarded the alibi defense and concentrated on the misidentification defense." *Ibid.* The district court specifically found that there was no justification for the limited scope of counsel's efforts: "Neither [trial counsel] nor the record suggest that constraints of time or resources played a part in [counsel's] decision to terminate his search for records corroborative of Roane's alibi." *Ibid.* Because of the "unreasonably limited amount of time and resources counsel devoted" to checking hotel records, *id.* at 57a, counsel missed potentially critical evidence tending to corroborate Roane's alibi, including a registration card for

the night of Moody's death under the name Larry Chiles, as well as a receipt indicating that Chiles had paid cash for the room, precisely as Roane had indicated. *Ibid.* Indeed, more than six years after the murder, Roane's post-conviction investigator found those records at the hotel within three hours. Trial counsel "could have located the same documents * * * if he had subpoenaed the records or if he had spent three hours looking through the hotel records." Pet. App. 51a.

The Fourth Circuit nonetheless held that counsel's performance was not deficient because, in its view, counsel made a "strategic choice" to abandon Roane's alibi defense. Pet. App. 41a. But placing the label "strategic choice" on an action does not make it reasonable, much less "strategic." For a decision to be reasonable, there must be some plausible basis for it. In this case, the district court found that there was none. "Neither [trial counsel] nor the record suggest that constraints of time or resources played a part in [counsel's] decision to terminate his search for records corroborative of Roane's alibi." *Ibid.* Nowhere did the Fourth Circuit disagree with that finding, much less offer a basis for deeming it clear error.

Neither the record nor common sense supports the Fourth Circuit's suggestion that trial counsel "turn[ed] to and focus[ed]" on the misidentification defense after concluding that the alibi defense was not viable. The district court—which conducted the trial of this case—expressly concluded (and trial counsel testified) that the misidentification defense and alibi were mutually reinforcing. C.A. App. 2178b. As the district court explained, Roane's contention that the government's witnesses were mistaken in identifying him, a theory already supported by another eyewitness to the crime, would have been significantly "bolstered" by evidence that he was miles away in a hotel at the time of the murder. Given the absence of any time, financial, or other constraints, there was simply no good

reason for counsel to give up on the effort to find records supporting Roane's alibi—an alibi that counsel himself believed. Trial counsel testified unequivocally that his abandonment of the alibi was not the result of a tactical decision, C.A. App. 2178b, and the Fourth Circuit offered no basis for declaring otherwise.

Ultimately, the Fourth Circuit's decision rests on the implicit assumption that any sort of "search" is sufficient, no matter how incomplete, if counsel makes *other* efforts to mount a defense. But the sufficiency of any investigation must be judged in light of the totality of the circumstances. *Strickland*, 466 U.S. at 691. Here, counsel believed Roane's alibi. He knew that it had witness support. He knew that corroborative records must exist. He concluded the alibi would reinforce his misidentification defense. And there were no limits on time or resources preventing him from conducting a sufficient investigation—from putting in the three hours of effort—necessary to locate potentially dispositive records corroborating Roane's alibi. He simply failed to make the required effort. Under the circumstances, the decision to terminate the search after minimal effort cannot be attributed to a legitimate strategic call.

The seriousness of counsel's error is particularly evident given the role of the Moody homicide in this case. The charge was not merely capital. It was the *only* capital count in which Roane was alleged to have killed by his own hand,[3] and the *only* capital charge for which Roane received the death penalty. If counsel had to raise reasonable doubt

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[3] Roane was accused of being the "lookout" in the murder of Peyton Maurice Johnson. C.A. App. 4860. The government claimed that Roane entered the "nip joint" where Peyton Johnson was; that Roane left; and that one of Roane's co-defendants then entered and shot Peyton Johnson. Louis Johnson was shot by multiple persons. Roane was accused of being armed and present at the scene of the crime; the evidence, however, showed that Roane did not shoot and kill Louis Johnson. *Id.* at 5136.

about a single accusation to save Roane's life, this one was it. In such a case, it is simply not enough for counsel to show up at the relevant location *intending* to conduct a reasonable search for corroborating documents. He must also follow through *by doing so*. Here, counsel did not.

Finally, we note that this question is similar to the fourth question presented in *Rompilla* v. *Beard*, No. 04-5462, cert. granted November 12, 2004 (argued Jan. 18, 2005). *Rompilla* concerns whether the defendant received effective representation at a capital sentencing "where counsel's background investigation" was "limited to conversations with a few family members," given that "other sources of background information * * * were available but ignored by counsel" and that the additional sources of information "would have provided compelling mitigating evidence." No. 04-5462 Pet. Br. ii. In that case, counsel failed to obtain documents about the defendant's mental deficiency and history of childhood abuse, even though they were accessible in school records and in the juvenile court records held in the clerk's office of the courthouse where the defendant was being tried. *Id.* at 10-14. There, as here, the district court held that counsel's failure to make a reasonable investigation was constitutionally ineffective. There, as here, the court of appeals reversed, holding that other efforts (such as hiring several experts) rendered the performance adequate. See *Rompilla* v. *Horn*, 355 F.3d 233, 253 (3rd Cir. 2004).

Indeed, the claim of ineffectiveness in this case is in many respects stronger than the one in *Rompilla*. In *Rompilla*, trial counsel's interviews of potential witnesses did not suggest that further research would uncover supporting records. According to the court of appeals in that case, trial counsel "had grounds for believing that if there was any mitigating evidence of this sort to be found, at least a hint of its availability would be disclosed in the interviews with [the defendant] and his family members." 355 F.3d at

252. Here, in contrast, trial counsel had more than a "hint" that the relevant records would exist. He had, as the district court found, every reason to believe that they did exist, including Roane's credible statements, and confirmation from another witness. Because this Court's resolution of *Rompilla* may bear strongly on the proper resolution of Roane's ineffective assistance claim, at a minimum the petition in this case should be held pending the decision in *Rompilla*, and then disposed of in light of the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, it should be held pending the Court's decision in *Rompilla* v. *Beard*, No. 04-5462, cert. granted November 12, 2004 (argued Jan. 18, 2005), and then disposed of in light of the decision in that case.

Respectfully submitted.

PAUL F. ENZINNA
Counsel of Record
HEATHER M. MCCANN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioner

February 22, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 03-13, 03-25, 03-26, and 03-27.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

CORY JOHNSON, DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD TIPTON, DEFENDANT-APPELLANT.

Argued: May 6, 2004.
Decided: Aug. 9, 2004.

Before WILKINSON, KING, AND DUNCAN, Circuit Judges.

KING, Circuit Judge:

In February 1993, James Roane, Cory Johnson, and Richard Tipton were convicted in the Eastern District of Virginia for an array of criminal activity, including several

capital murders, arising out of drug-trafficking operations in and near Richmond. Each received at least one death sentence for his crimes, plus various terms of imprisonment. After unavailing direct appeals to this Court, *United States* v. *Tipton*, 90 F.3d 861 (4th Cir. 1996), Roane, Johnson, and Tipton (the "Defendants") sought habeas corpus relief in the district court. The Government sought summary judgment on their claims, which the district court awarded, except for two claims raised by Roane. *See United States* v. *Tipton*, No. 3:92CR68 (E.D. Va. May 1, 2003) (the "Opinion"). After discovery proceedings and an evidentiary hearing on Roane's remaining two claims, the court granted relief on his Sixth Amendment claim of ineffective assistance of counsel ("IAC claim"), vacating Roane's convictions and sentences relating to the murder of Douglas Moody. *See United States* v. *Roane*, No. 3:92CR68 (E.D. Va. May 1, 2003) (the "Roane Opinion"). Finally, the court rejected Roane's claim of actual innocence of the Moody murder. *Id.*

We are now presented with four separate appeals, which we have consolidated. In Appeal No. 03-13, the Government appeals the district court's award of relief to Roane on his Sixth Amendment IAC claim. In No. 03-25, Roane cross-appeals the court's rulings in favor of the Government on certain of his other claims. And in Nos. 03-26 and 03-27, Johnson and Tipton appeal the award of summary judgment to the Government on certain of their claims. As explained below, we affirm the rulings in favor of the Government in Nos. 03-25, 03-26, and 03-27, and we reverse the award of relief to Roane in No. 03-13.

I.

A.

In our comprehensive 1996 opinion rejecting the Defendants' direct appeals, Judge Phillips aptly summarized the relevant facts underlying the prosecution of

Johnson, Tipton, and Roane. *See Tipton*, 90 F.3d at 868-70. Because we are unable to improve on that summary, it is set forth *in haec verba*:

> Recounted in summary form and in the light most favorable to the Government, the core evidence revealed the following. Tipton, Roane, and Cory Johnson were principal "partners" in a substantial drug-trafficking conspiracy that lasted from 1989 through July of 1992. The conspiracy's operations began in Trenton, New Jersey where Johnson and Tipton, both from New York City, became members. In August of 1990, the conspiracy expanded its operations to Richmond, Virginia where Roane joined the conspiracy in November of 1991. The Trenton-based operation came to an end on June 4, 1991 when police confiscated a large quantity of crack cocaine and firearms. In late 1991, the conspiracy's operations were expanded from the Central Gardens area of Richmond to a second area in Richmond called Newtowne.
>
> During the period of the conspiracy's operation, its "partners", including appellants, obtained wholesale quantities of powdered cocaine from suppliers in New York City, converted it by "cooking" [it] into crack cocaine, then packaged it, divided it among themselves, and distributed it through a network of 30-40 street level dealers, "workers." Typically, the appellants and their other partners in the conspiracy's operations took two-thirds of the proceeds realized from street-level sales of their product.
>
> Over a short span of time in early 1992, Tipton, Cory Johnson, and Roane were variously implicated in the murders of ten persons within the Richmond area—all in relation to their drug-trafficking operation and either because their victims were suspected of treachery or other misfeasance, or because they were competitors in

the drug trade, or because they had personally offended one of the "partners."

On January 4, 1992, Tipton and Roane drove Douglas Talley, an underling in disfavor for mishandling a drug transaction, to the south side of Richmond. Once there, Roane grabbed Talley from the rear while Tipton stabbed him repeatedly. The attack lasted three to five minutes and involved the infliction of eighty-four stab wounds to Talley's head, neck, and upper body that killed him.

On the evening of January 13, 1992, Tipton and Roane went to the apartment of Douglas Moody, a suspected rival in their drug-trafficking area, where Tipton shot Moody twice in the back. After Moody fled by jumping through a window, both Tipton and Roane pursued. Roane, armed with a military-style knife retrieved from an apartment where the knife was kept for co-conspirator Curtis Thorne, caught up with Moody in the front yard of the apartment where he stabbed him eighteen times, killing him.

On the night of January 14, 1992, Roane, Cory Johnson, and a third person retrieved a bag of guns that they had left at an apartment earlier that day. Roane then located Peyton Johnson, another rival drug dealer, at a tavern. Shortly after Roane left the tavern, Cory Johnson entered with another person and fatally shot Peyton Johnson with a semiautomatic weapon.

On January 29, 1992, Roane pulled his car around the corner of an alley, got out of the vehicle, approached Louis Johnson, whom appellant Johnson thought had threatened him while acting as bodyguard for a rival dealer, and shot him. Cory Johnson and co-conspirator Lance Thomas then got out of Roane's car and began firing at Louis Johnson. As Louis Johnson lay on the ground, either Cory Johnson or Thomas shot him twice

at close range. Louis Johnson died from some or all of these gunshot wounds.

On the evening of February 1, 1992, Cory Johnson and Lance Thomas were told that Roane had gone to the apartment of Torrick Brown, with whom Roane had been having trouble. Johnson and Thomas armed themselves with semiautomatic weapons and went to the apartment where they joined appellant Roane outside. The three then knocked on Brown's door and asked his half-sister, Martha McCoy, if Brown was there. She summoned Brown to the door and Cory Johnson, Roane, and Thomas opened fire with semiautomatic weapons, killing Brown and critically wounding McCoy.

In late January, 1992, after being threatened by Cory Johnson for not paying for a supply of crack cocaine, Dorothy Armstrong went to live with her brother, Bobby Long. On February 1, Cory Johnson learned from Jerry Gaiters the location of Long's house. Thereafter, Tipton and an unidentified "young fellow" picked up Gaiters and Cory Johnson who were then driven by Tipton to a house where the group obtained a bag of guns. After dropping off the unidentified third party, the group proceeded to Long's house. Upon arriving at Long's house, Cory Johnson and Gaiters got out of the car and approached the house. While Tipton waited in the car, Cory Johnson and Gaiters went to the front door. When Long opened the door, Cory Johnson opened fire, killing both Dorothy Armstrong and one Anthony Carter. Bobby Long fled out the front door, but was fatally shot by Cory Johnson in the front yard.

In early February 1992, Cory Johnson began to suspect that Linwood Chiles was cooperating with the police. On February 19, 1992, Johnson borrowed Valerie Butler's automobile and arranged to meet with Chiles. That night, Chiles, Curtis Thorne, and sisters Priscilla and

Gwen Greene met Cory Johnson and drove off together in Chiles's station wagon. Chiles parked the car in an alley, and Tipton soon drove in behind it in another car, got out, and came up alongside the stationwagon. With Tipton standing by, Cory Johnson told Chiles to place his head on the steering wheel and then shot Chiles twice at close range. Additional shots were fired, killing Thorne and critically wounding both of the Greene sisters. The autopsy report indicated that Thorne had been hit by bullets fired from two different directions.

Tipton was charged under 21 U.S.C. § 848(e) and 18 U.S.C. § 2 with capital murder for eight of these killings (Talley, Moody, Louis Johnson, Long, Carter, Armstrong, Thorne, and Chiles); Cory Johnson, with seven (Louis Johnson, Long, Carter, Armstrong, Thorne, Chiles, and Peyton Johnson); and Roane, with three, (Moody, Louis Johnson, and Peyton Johnson).

The jury convicted Tipton of six of the eight capital murders with which he was charged under § 848(e) (Talley, Armstrong, Long, Carter, Chiles, and Thorne). One of the other two § 848(e) charges was dismissed (Louis Johnson) and the other resulted in acquittal (Moody). Tipton was also convicted of conspiracy to possess cocaine base with the intent to distribute (21 U.S.C. § 846), engaging in a [continuing criminal enterprise ("CCE")] (21 U.S.C. § 848(a)), eight counts of committing acts of violence (the eight killings charged under § 848(e)) in the aid of racketeering activity (18 U.S.C. § 1959), two counts of using a firearm in relation to a crime of violence or a drug-trafficking crime (18 U.S.C. § 924(c)), and two counts of possessing cocaine base with intent to distribute (21 U.S.C. § 841(a)(1)).

The jury convicted Cory Johnson of all seven of the capital murders with which he was charged under § 848(e) (Louis Johnson, Long, Carter, Armstrong,

Thorne, Chiles, and Peyton Johnson). He was also convicted of conspiracy to possess cocaine base with the intent to distribute (21 U.S.C. § 846), engaging in a CCE (21 U.S.C. § 848(a)), eleven counts of committing acts of violence (including the seven killings charged under § 848(e)) in aid of racketeering activity (18 U.S.C. § 1959), five counts of using a firearm in relation to a crime of violence or drug-trafficking offense (18 U.S.C. § 924(c)), and two counts of possession of cocaine base with the intent to distribute (21 U.S.C. § 841(a)(1)).

The jury convicted Roane of all three of the capital murders with which he was charged under § 848(e) (Moody, Peyton Johnson, and Louis Johnson.) He was also convicted of conspiracy to possess cocaine base with the intent to distribute (21 U.S.C. § 846), engaging in a CCE (21 U.S.C. § 848(a)), five counts of committing acts of violence (including the three killings charged under § 848(e)) in aid of racketeering activity (18 U.S.C. § 1959), four counts of using a firearm in relation to a crime of violence or a drug trafficking offense (18 U.S.C. § 924(c)), and one count of possession of cocaine base with the intent to distribute (21 U.S.C. § 841(a)(1)).

Following a penalty hearing on the capital murder counts, the jury recommended that Cory Johnson be sentenced to death on all of the seven § 848(e) murders of which he had been convicted; that Tipton be sentenced to death for three of the six § 848(e) murders of which he was convicted (Talley, Chiles, and Thorne); and that Roane be sentenced to death for one of the three of which he was convicted (Moody). The district court sentenced Johnson, Tipton, and Roane to death in accordance with the jury's recommendations pursuant to 21 U.S.C. § 848(l), and imposed various sentences of imprisonment upon each of the appellants for the several noncapital counts on which they were convicted and for

> those capital murder counts on which Tipton and Roane had been convicted but were not given death sentences.
>
> On appellants' motion, the district court refused to order execution of the several death sentences on the grounds that Congress had neither directly authorized the means by which the death sentences imposed under § 848 should be carried out, nor properly delegated to the Attorney General the authority to issue the implementing regulations that were invoked by the Government. In consequence, the district court stayed execution of the death sentences it had imposed until such time as Congress had authorized the means of execution.

Id.

When the Defendants initially appealed their convictions and sentences to this Court, the Government cross-appealed the district court's stay of their death sentences. In our *Tipton* opinion, we analyzed and disposed of approximately sixty issues, including challenges by the Defendants to aspects of the jury-selection process, the trial's guilt phase, and the trial's penalty phase. *See id.* at 870-901. In rejecting nearly all these challenges, we affirmed the convictions and sentences of the Defendants, except for their convictions for violating 21 U.S.C. § 846 (conspiracy to commit drug offenses), which we vacated on double jeopardy grounds. Finally, on the Government's cross-appeal, we vacated the stay of their death sentences and remanded for the executions to proceed in accordance with regulations promulgated by the Attorney General. *Id.* at 901-03.

B.

Following our decision in *Tipton*, the Defendants persisted in seeking relief from their convictions and sentences. On May 8, 1998, they sought leave to interview jurors, pursuant to Local Rule 83.5 of the district court,

which was denied. *Johnson* v. *Pruett*, No. 3:97CV895 (E.D. Va. June 10, 1998). On June 1, 1998, the Defendants sought relief under 28 U.S.C. § 2255, filing motions to vacate, set aside, or correct their sentences.[1] The Government sought summary judgment on these motions, and the Defendants, in June 1999, requested leave to conduct discovery. The court granted the discovery request in part, authorizing Tipton to conduct certain forensic testing. *Johnson* v. *Pruett*, No. 3:97CV895 (E.D. Va. May 3, 2000).

In its Opinion disposing of the § 2255 motions, the district court awarded summary judgment to the Government except on Roane's claims that: (1) he was denied effective assistance of counsel in connection with the Moody murder, and (2) he was actually innocent of that murder. *See* Opinion at 114. The Defendants thereafter filed a joint motion to alter the Opinion, which the court denied. *United States* v. *Tipton*, No. 3:92CR68 (E.D. Va. July 15, 2003).. Johnson and Tipton then moved for the issuance of certificates of appealability, which the district court awarded on November 26, 2003, as to all claims raised in their § 2255 motions. *United States* v. *Tipton*, No. 3:92CR68 (E.D. Va. Nov. 26, 2003). Johnson and Tipton have filed timely appeals, and we possess jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

C.

On June 21, 2002, the district court conducted an evidentiary hearing on Roane's IAC claim and on his claim of actual innocence. In the Roane Opinion of May 1, 2003, the court made findings of fact regarding the representation rendered by Roane's trial attorney. *See* Roane Opinion at 2-8. In so doing, the court first addressed the

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[1] Pursuant to § 2255 of Title 28, a federal prisoner claiming his "sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

evidence implicating Roane in the Moody murder, finding as follows:

- Denise Berkley testified that on the night of the Moody murder, she watched Roane stab Moody "18 or 19 times" while Moody pleaded for his life; that she then saw Sandra Reavis, Roane, Curt Thorne, Linwood Chiles, and Priscilla "Pepsi" Greene leave the scene of the murder in Chiles's station wagon; and that Roane took the knife he used to stab Moody and gave it to Pepsi Greene, asking her to get rid of it;
- Pepsi Greene testified that she heard two or three shots and then saw Roane and Tipton exit the house from which the shots were fired; that Roane then directed her to get him a knife; and that later that night, Roane returned the knife, then covered with blood, and told her to get rid of it; and
- Robert Davis testified that, immediately following the Moody murder, he saw Tipton and Roane by the steps near his house and heard them stating, "Yeah, I got him, I got him . . . we can't stay out here, man. This is hot anyway."

Id. at 3-4. Importantly, the court found the testimony of these witnesses to be "credible and . . . corroborated by the physical evidence of murder including the autopsy and the crime scene video." *Id.* at 4. Indeed, the court found Greene's testimony to be "particularly compelling." *Id.*

The court then focused on the evidence of Gina Taylor, who observed the Moody murder. Taylor had testified at trial that Roane was not involved. *Id.* The court found, however, that the value of Taylor's evidence was undermined by (1) her acknowledgment that she could not identify the assailant's gender and that she did not see his face, (2) the fact that she was evasive on cross-examination, and (3) her acknowledgment that she had "kind of" dated Tipton. *Id.*

The court then made findings regarding Roane's alibi for the Moody murder. According to the court, Roane had advised his lawyer prior to trial of the following: (1) he did not participate in the murder of Moody; (2) on January 12, 1992—the night of the murder—he was in a Howard Johnson hotel room with codefendant Sandra Reavis; (3) he and Reavis were driven to the hotel by Linwood Chiles; (4) Carmella Cooley accompanied them to the hotel; and (5) Chiles had registered and paid cash for the hotel room. *Id.* at 5. The court found that the lawyer, David Baugh, "was convinced that Roane did not participate in the Moody murder" and that the hotel was a "couple of miles from where Douglas Moody was murdered." *Id.*

In addressing Mr. Baugh's pretrial investigation into Roane's alibi, the court found the following: (1) Mr. Baugh interviewed Cooley, who said that she had once accompanied Roane and Reavis to the Howard Johnson but could not verify the date; (2) Mr. Baugh concluded that Cooley's ignorance of the date and apparent hostility would make her a bad witness; (3) Mr. Baugh contacted the hotel seeking records of Linwood Chiles renting a room on January 12, 1992; (4) when the hotel manager advised that there were no such records, Mr. Baugh went to the hotel and personally sought to locate such records; (5) Mr. Baugh limited his search to the name "Linwood Chiles," and searched only for records of January 12, 1992; and (6) Mr. Baugh found no records of Linwood Chiles being registered at the hotel on January 12, 1992. *Id.*

The court analyzed the sufficiency of Mr. Baugh's pretrial investigation and concluded that it was constitutionally deficient. In so ruling, it found that: (1) an investigator hired by Roane's habeas corpus lawyer went to the Howard Johnson and looked through boxes of occupancy records for three hours; (2) the investigator found a card with the name "Chiles, Linwood" from the night of January 2, 1992, and a card with the name "Chiles, Larry" from the

night of January 12, 1992; (3) in his trial preparation, Mr. Baugh could have subpoenaed the Howard Johnson records, or he could have devoted more effort to searching for them; (4) if Mr. Baugh had utilized the subpoena process or searched more diligently, he could have located the records found by the investigator; and (5) Roane was amenable to testifying in his own defense but was advised by Mr. Baugh not to testify unless his alibi defense could be objectively corroborated. *Id.* at 5-6.

Finally, the court made several findings on the evidence presented in the habeas corpus evidentiary hearing, to the following effect: (1) Roane's testimony was "tenable but not compelling"; (2) although Reavis confirmed Roane's alibi, her testimony was "flat and unpersuasive"; (3) because she would not waive her Fifth Amendment rights, Reavis would not have testified at trial; (4) Demetrius Rowe testified that, at about 8:30 p.m. on the night of the Moody murder, Reavis told Rowe that she was going to a hotel with Roane; (5) Rowe saw Reavis and Roane leave the area—not in Chiles's station wagon (as Roane claimed) but in a cab; (6) Rowe witnessed the murder of Moody and was sure Roane was not present; (7) Rowe did not provide anyone with this information before trial; and (8) to the extent it exculpated Roane, Rowe's evidence was "not credible" and "would carry no weight with a jury." *Id.* at 7.

Assessing all these findings in the context of the case, the court concluded that Mr. Baugh was constitutionally ineffective in his investigation of Roane's alibi. It therefore vacated Roane's convictions and sentences on the three counts related to the Moody murder, that is, Counts Five, Six, and Seven.[2] *Id.* at 13. Finally, the court denied relief on Roane's claim of actual innocence.[3] *Id.*

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[2] On Count Five, Roane was convicted of killing Moody while engaged in or working in furtherance of a CCE, in violation of 21 U.S.C. § 848(e)(1)(A). On Count Six, Roane was convicted of using a

The Government appealed the court's ruling in favor of Roane on his IAC claim, and Roane sought a certificate of appealability on certain of the claims resolved against him, which the district court issued. *United States* v. *Tipton*, No. 3:92CR68 (E.D. Va. Nov. 26, 2003). Roane then cross-appealed, and we possess jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

II.

In our consideration of the district court's rulings, we review its legal conclusions de novo and its findings of fact for clear error. *Monroe* v. *Angelone*, 323 F.3d 286, 299 (4th Cir. 2003); *see also Quesinberry* v. *Taylor*, 162 F.3d 273, 276 (4th Cir. 1998). We review de novo mixed questions of law and fact addressed by the district court—including the issue of whether a lawyer's performance was constitutionally adequate. *Smith* v. *Angelone*, 111 F.3d 1126, 1131 (4th Cir. 1997). We review for abuse of discretion the district court's decision to deny a post-trial request to interview jurors, *United States* v. *Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988), as well as its rulings on a discovery request. *See Thomas* v. *Taylor*, 170 F.3d 466, 474 (4th Cir. 1999).

III.

The Defendants raise multiple issues on appeal, and the district judge has awarded a certificate of appealability on each of them.[4] Under the applicable statute, an appeal may

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firearm in relation to the killing of Moody, in violation of 18 U.S.C. § 924(c). And on Count Seven, Roane was convicted of killing Moody in order to maintain or increase his position in a racketeering enterprise, in violation of 18 U.S.C. § 1959.

[3] Roane does not appeal the court's rejection of his claim of actual innocence.

[4] In Part III of this opinion, we spell out and address those issues raised by the Defendants in Nos. 03-25, 03-26, and 03-27. In Part IV, we address the Government's appeal (No. 03-13) from the award of relief to Roane on his IAC claim.

not be taken from a final order of a district court in a § 2255 proceeding unless a certificate of appealability has been issued. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and the judge must specify the issues on which the certificate has been granted, *id.* § 2253(c)(3). In this instance, the district judge issued certificates of appealability to the Defendants and explained, "[u]pon consideration of the Defendants' claims and the arguments offered in support thereof, the Court concludes that the issues for which the Defendants seek a certificate of appealability are adequate to deserve encouragement to proceed further." *United States* v. *Tipton*, No. 3:92CR68 (E.D. Va. Nov. 26, 2003).

Although some of the issues raised on appeal are common to the Defendants, certain issues pertain to only two of the Defendants or solely to a particular defendant.[5] Each of their contentions, however, falls into one of six categories:

(1) claims that the prosecution unconstitutionally discriminated against women in the jury selection process;

(2) challenges to their § 848 CCE convictions—including claims that the trial court erred in failing to instruct and counsel were ineffective in failing to request an instruction that (a) the jury had to unanimously agree on which predicate violations constituted a "continuing series"; (b) the jury had to unanimously agree on the identities of the "five or more persons" that each Defendant supervised; and (c) certain categories of persons and certain types of relationships cannot constitute supervision;

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[5] When all three Defendants have raised the same issue on appeal, we refer to "the Defendants." Otherwise, we identify by name the defendant raising a particular issue.

(3) claims of prosecutorial misconduct during trial—including claims that (a) the prosecution knowingly introduced perjured testimony from witnesses Gregg Scott, Maurice Saunders, and Hussone Jones; and (b) the prosecution improperly withheld exculpatory evidence regarding witnesses "Wildman" Stevens, John Knight, and Stoodie Green;

(4) challenges to the court's conduct of the habeas corpus proceedings—including (a) challenges to the standard employed by the court in assessing the Defendants' discovery requests; (b) the contention that the court abused its discretion in granting summary judgment without allowing further discovery; and (c) Johnson and Tipton's claim that the court erroneously denied their motion for leave to interview jurors;

(5) IAC claims not otherwise addressed—including (a) that their lawyers should have further investigated their alleged gang activities in New York and New Jersey; (b) Johnson and Tipton's claim that their lawyers should have requested a voir dire inquiry on whether prospective jurors had a tendency to favor the death penalty; (c) Johnson and Tipton's claim that their lawyers failed to present mitigating evidence regarding prison conditions; (d) Tipton's claims that his lawyers failed to present adequate defenses to the Talley and Stoney Run murders;[6] (e) Tipton's claim that his lawyers failed to present an adequate case-in-mitigation; (f) Roane's claim that his lawyers conceded certain

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[6] In the Talley murder, Tipton and Roane had driven Douglas Talley to Richmond's southside in January 1992, where Tipton stabbed Talley eighty-four times in the head, neck, and upper body. In the Stoney Run murders, Cory Johnson and Tipton, in February 1992, shot into Linwood Chiles's stationwagon, killing Chiles and Curtis Thorne, and seriously wounding the Greene sisters, Priscilla ("Pepsi") and Gwen.

aggravating factors; and (g) Roane's claim that his lawyers waived his right to attend the voir dire proceedings; and

(6) Johnson's Eighth Amendment claim that he is mentally retarded and cannot constitutionally be executed, and that his counsel were ineffective in failing to address this issue at sentencing and on direct appeal.[7]

We assess these various issues in turn.[8]

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[7] The Defendants raise four other claims that were already addressed and rejected on direct appeal. Those claims are: (1) Defendants' contention that they were denied their rights to "justice without discrimination," in violation of 21 U.S.C. § 848(o) and the Fifth and Eighth Amendments, *see Tipton*, 90 F.3d at 891 n. 16; (2) Johnson and Tipton's contention that § 848(h) constitutes an unconstitutional delegation of legislative authority to prosecutors by allowing them to allege non-statutory aggravating factors, *see id.* at 895; (3) Johnson and Tipton's claim that the evidence at trial was insufficient to show that they supervised five or more persons, as required by § 848, *see id.* at 890; and (4) Johnson and Tipton's claim of misconduct by juror Cooke due to mid-trial publicity, *id.* at 891 n. 16. Because the Defendants have not pointed to any change in the law that warrants our reconsideration of these claims, we agree with the district court that they cannot relitigate these issues. *See* Opinion at 2-3; *see Boeckenhaupt* v. *United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (explaining that defendant cannot relitigate issues previously rejected on direct appeal).

[8] The Defendants also maintain that, pursuant to *Ring* v. *Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), their death sentences are constitutionally invalid under the Fifth Amendment because the Indictment failed to allege the statutory aggravating factors under 21 U.S.C. § 848(n)(1)-(12) that define eligibility for the death penalty. *See Ring*, 536 U.S. at 589, 122 S.Ct. 2428 (explaining that a capital defendant is entitled, under the Sixth Amendment, to a jury determination of any fact that increases the maximum penalty from life imprisonment to death); *United States* v. *Higgs*, 353 F.3d 281, 297 (4th Cir. 2003) (explaining that *Ring* dictates that any factor required to be submitted to the jury must be included in the indictment pursuant to the Fifth Amendment Indictment Clause). After oral argument in this case, the Court held

A.

At trial, the Government utilized two of its peremptory challenges to strike men from the jury panel, and it used eight peremptory challenges to strike prospective women jurors. The Defendants, however, failed to object at trial to the Government's use of its peremptory challenges. After trial, but before Defendants' direct appeal, the Supreme Court held that intentional gender discrimination by use of peremptory challenges contravenes the Equal Protection Clause. *J.E.B.* v. *Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (extending its holding in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) from racial discrimination to gender discrimination). The Defendants, in their direct appeal, raised the issue of sex discrimination in jury selection. In rejecting their claim, we explained that they had produced no evidence to support their claim, other than "raw figures" of men versus women stricken by the prosecution, and such raw figures were insufficient to make a prima facie showing of gender discrimination. *Tipton*, 90 F.3d at 881 & n. 11. Because we addressed this issue on direct appeal in *Tipton*, the Defendants cannot raise their *J.E.B.* claim again in these § 2255 proceedings.[9]

The Defendants also maintain that the failure of their counsel to object to the prosecution's use of its peremptory challenges constitutes ineffective assistance of counsel. At

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that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro* v. *Summerlin*, ___ U.S. ___, ___, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004). And although *Schriro* involved the Sixth Amendment aspect of *Ring*, its reasoning—that *Ring* is procedural and does not classify as a rule worthy of retroactive effect—applies equally here.

[9] Because we have already considered Defendants' *J.E.B.* claim on direct appeal and therefore will not reconsider it, we do not reach the district court's conclusion that the claim was defaulted by Defendants' failure to raise it at trial. *See* Opinion at 12.

the time of their trial, however, the Supreme Court had not granted certiorari in *J.E.B.*, and the Ninth Circuit was the only federal appellate court to extend the *Batson* principle to gender discrimination. *See United States* v. *De Gross*, 960 F.2d 1433, 1437-43 (9th Cir. 1992) (en banc). Indeed, we had explicitly rejected attempts to extend *Batson* to gender. *See United States* v. *Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988) ("[W]e reject appellants' suggestion that the Equal Protection Clause compels us to extend *Batson* to apply to peremptory challenges exercised on the basis of gender."). In light of this precedent, the Defendants are unable to demonstrate that their counsel's failure to object to the prosecution's use of peremptory strikes against prospective female jurors fell below the range of professionally competent performance. *See United States* v. *McNamara*, 74 F.3d 514, 517 (4th Cir. 1996) (explaining counsel not deficient for following controlling circuit precedent at time of trial). Accordingly, we must affirm the court's ruling on the IAC claims premised on the lack of an objection at trial to the prosecution's use of its peremptory strikes.

B.

We turn next to the Defendants' multiple claims of error regarding their convictions on the CCE counts. In order to convict a defendant of a CCE offense, the Government is required to prove five elements:

> (1) [the] defendant committed a felony violation of the federal drug laws; (2) such violation was part of a continuing series of violations of the drug laws; (3) the series of violations were undertaken by defendant in concert with five or more persons; (4) defendant served as an organizer or supervisor, or in another management capacity with respect to those other persons; and (5) defendant derived substantial income or resources from the continuing series of violations.

United States v. *Ricks*, 882 F.2d 885, 890-91 (4th Cir. 1989); see also 21 U.S.C. § 848(c). On appeal here, and in their § 2255 proceedings in district court, the Defendants focus on the second, third, and fourth of these elements.

1.

In their direct appeals, the Defendants asserted that the trial court had plainly erred in failing to instruct the jury that it was required to unanimously agree on three predicate violations supporting the "continuing series" element of § 848(c).[10] Assuming that unanimity was required, we rejected this claim and explained that "the record plainly indicates that appellants could have suffered no actual prejudice from the lack of a special unanimity instruction on the predicate violation element" because "[b]y its verdict, it is clear that the jury unanimously found each guilty of at least five predicate violations . . . ." *Tipton*, 90 F.3d at 885.

After we rendered our *Tipton* decision, the Supreme Court confirmed what we had assumed there. It held that, in a CCE prosecution, the jury must unanimously agree on the specific violations that make up the "continuing series." *Richardson* v. *United States*, 526 U.S. 813, 816, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). The Defendants now contend that the trial court's failure to give the *Richardson* instruction constitutes a structural defect in their trial and that they are therefore not required to show prejudice. In the alternative, they assert that they have demonstrated prejudice. Johnson and Tipton also maintain that their lawyers were ineffective in failing to object to the lack of a unanimity instruction. As explained below, we agree with the district court that these claims lack merit.

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[10] In *Richardson* v. *United States*, 526 U.S. 813, 818, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), the Court assumed, without deciding, that the necessary number to make up a "continuing series" is three. The parties do not dispute this number here.

We have recognized that a trial court's failure to give a *Richardson* instruction is a procedural defect rather than a structural one. *United States* v. *Stitt*, 250 F.3d 878, 883 (4th Cir. 2001) (rejecting assertion that *Richardson* error is structural defect); *United States* v. *Brown*, 202 F.3d 691, 699 (4th Cir. 2000) (same). As explained in *Stitt*, a trial court's failure to give a *Richardson* instruction is subject to harmless error analysis, and a defendant raising such an issue must therefore demonstrate prejudice. *Stitt*, 250 F.3d at 883. We ruled on the Defendants' direct appeal that the trial court's failure to give a *Richardson*-type instruction did not prejudice them, *see Tipton*, 90 F.3d at 885, and we must therefore affirm the district court on this point.

In addition to their substantive *Richardson* claims, Johnson and Tipton maintain that their counsel's failure to request a *Richardson*-type instruction at trial constitutes ineffective assistance, in violation of the Sixth Amendment. Again, our decision on direct appeal forecloses this contention. In order to prevail on an IAC claim, a defendant must demonstrate that: (1) counsel's performance was deficient; and (2) such deficient performance prejudiced the defense. *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because we decided in *Tipton* that the Defendants were not prejudiced by the lack of a *Richardson* instruction, Johnson and Tipton are unable to satisfy the second prong of *Strickland*. Accordingly, we affirm the court's ruling on this claim as well.

2.

Relying on *United States* v. *Jerome*, 942 F.2d 1328, 1330-31 (9th Cir. 1991), Johnson and Tipton next contend that they were entitled to a special unanimity instruction on the CCE charge regarding the identities of the "five or more persons" that each of them was alleged to have supervised. *See* 21 U.S.C. § 848(c). Not only has this claim been inexcusably defaulted by Johnson and Tipton's failure to raise it either at trial or on direct appeal, it also fails

because, in *Stitt*, we held that *Richardson* did not change the rule "that the jury need not unanimously agree on which five persons were organized, supervised, or managed by the defendant." *Stitt*, 250 F.3d at 886.

Johnson and Tipton nevertheless claim that their attorneys were constitutionally ineffective in failing to raise this unanimity issue at trial. Because *Stitt* stands for the proposition that unanimous agreement on the identity of each supervisee is not required, we agree with the district court that the lawyers were not ineffective in failing to seek such an instruction. *See* Opinion at 21-25.

3.

Johnson and Tipton next contend that the trial court erred in failing to instruct—and counsel were ineffective in failing to request—that certain categories of persons (i.e., drug kingpins) cannot as a matter of law be supervisees, and that certain types of relationships (i.e., buyer-seller) cannot constitute supervision. *See United States* v. *Barona*, 56 F.3d 1087, 1096-97 (9th Cir. 1995) (finding error in failing to instruct that certain individuals who were on list of potential supervisees given to jury were incapable, as a legal matter, of counting as supervisees). This claim has been defaulted by the failure of Johnson and Tipton to raise it either at trial or on direct appeal. *See Bousley* v. *United States*, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Like the district court, *see* Opinion at 19, 21-25, however, we will briefly examine this claim in order to assess the contention that counsel's failure to raise it in a timely manner resulted from constitutionally ineffective representation.

The trial court gave the following instruction regarding the supervision element of § 848(c):

> [t]he term "organizer" and the term "supervisory position" and "position of management" are to be given their usual and ordinary meanings. These words imply

> the exercise of power or authority by a person who occupies some position of management or supervision.

See Opinion at 19-20. We upheld this very instruction in *United States* v. *Hall*, 93 F.3d 126, 130 (4th Cir. 1996), two months after our decision in *Tipton*. In Hall, the defendant maintained that the jury should have been instructed that he could have neither supervised nor organized individuals with whom he had only a buyer-seller relationship. *Id.* As we explained in *Hall*, "[j]urors are competent to understand and apply ordinary concepts like organizer, supervisor and management." *Id.* at 131. This jury, like the one in *Hall*, was fully capable of understanding the term "supervision." Accordingly, Johnson and Tipton were not prejudiced by the lack of such an instruction, and their counsel were not ineffective in failing to request a more detailed instruction regarding these terms.[11]

C.

We turn next to the contentions of Johnson and Tipton that their trial was prejudiced by multiple instances of prosecutorial misconduct. They contend that the prosecution knowingly introduced false testimony at trial, in contravention of their due process rights, from witnesses Gregg Scott, Maurice Saunders, and Hussone Jones. And Tipton asserts that the Government contravened the

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[11] Johnson and Tipton also maintain that the trial court erred in failing to instruct, and that counsel were ineffective in failing to request an instruction, that the Government must prove "management" in order to satisfy the CCE statute's "organizer" or "supervisor" element. This contention ignores our precedent that proof that a CCE defendant exercised some degree of control over others is not required to show that he acted as an organizer. *See Butler*, 885 F.2d at 201. Even if proof of control were required, the trial court properly instructed the jury that supervision constitutes the "exercise of power and authority by a person who occupies some position of management." Accordingly, this contention is without merit.

principles of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding from them exculpatory evidence pertaining to the witnesses "Wildman" Stevens, John Knight, and Stoodie Greene. We assess these claims in turn.

1.

First, Johnson and Tipton contend that the prosecution knowingly introduced perjured testimony from Gregg Scott, Maurice Saunders, and Hussone Jones. In order to prevail on such a claim, Johnson and Tipton are required to demonstrate that: (1) the testimony was false, *see Boyd* v. *French*, 147 F.3d 319, 329-30 (4th Cir. 1998); (2) the Government knew the testimony was false, *see Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir. 1975); and (3) there is a reasonable probability that the false testimony could have affected the verdict, *Boyd*, 147 F.3d at 330. As explained below, we agree with the district court that this claim must be rejected.

a.

In support of this habeas corpus claim, Johnson and Tipton submitted affidavits from various gang members in New York, asserting that Gregg Scott had lied at trial when he: (1) testified that the New York Boyz (a gang of which Johnson and Tipton were allegedly members) met to discuss retaliating against individuals who threatened other members of the gang; and (2) testified that he received guns from a man known as "Light."[12] Although Johnson and Tipton raised a factual issue on the falsity of these statements, they offered no proof that the Government knew or should

[12] Johnson and Tipton also submitted affidavits that Greg Scott lied when he: (1) said that he grew up at 155th and Amsterdam in New York; and (2) described the New York Boyz as a gang. The district court found that these statements simply constitute differences of opinion, rather than statements of fact. *See* Opinion at 33. Johnson and Tipton do not contest this finding on appeal.

have known this testimony to be false. Opinion at 33-35. And the fact that the evidence may have benefitted the Government is not enough. Such "'[a]iry generalities, conclusory assertions and hearsay statements [do] not suffice' to stave off summary judgment or entitle a habeas petitioner to an evidentiary hearing, because none of these would be admissible evidence at an evidentiary hearing." *Id.* at 35 (quoting *United States* v. *Aiello*, 814 F.2d 109, 113 (2d Cir. 1987)). We therefore affirm the district court's ruling on this claim.

b.

Johnson and Tipton next assert that the Government knew, or that it should have known, that Maurice Saunders testified falsely at trial when he claimed that he saw Light during two trips to New York, and that Light could not have been in New York because he was in fact incarcerated elsewhere during Saunders's visits. Again, Johnson and Tipton proffer no evidence that the Government, at the time of trial, knew or should have known of Light's incarceration. *See Horton* v. *United States*, 983 F. Supp. 650, 654-55 (E.D. Va. 1997) (rejecting assertion that, for *Brady* purposes, federal prosecutor is charged with knowledge of state prison records). And conclusory accusations that the Government should have known that a statement was false, without more, do not warrant an evidentiary hearing or offer escape from summary judgment. *See Aiello*, 814 F.2d at 113-14.

In any event, Johnson and Tipton have made no showing that such testimony about Light's incarceration, even if untrue, could have affected the outcome of their trial. As the district court explained in denying their IAC claim regarding the prosecution's failure to discover Light's incarceration, the Government presented extensive trial evidence of Johnson and Tipton's New York connections and gang-related activities. Opinion at 39 (explaining that the proffered testimony of Light's incarceration does not

negate the following: "Anthony Howlen's testimony that Johnson and Tipton were part of the New York Boyz and sliced him with razors when he interfered with their attempts to sell drugs in New Jersey; the repeated references to the New York Boyz during the course of the Richmond based activities; Tipton's threats to invoke the assistance of his New York associates if retaliatory actions were required; the appearance of New York Boyz Lance Thomas and Hess in Richmond; and the repeated trips by Tipton and Johnson from Richmond to New York to obtain drugs"). We therefore affirm the district court on this claim.

c.

Johnson and Tipton also contend that the witness Hussone Jones lied when he testified about the murder of Douglas Talley. Jones testified at trial that he watched from his own car as Tipton stabbed Talley in Talley's car. Johnson and Tipton assume that this testimony was false because there were no street lights in the area of the crime, and they contend it was too dark for Jones to see anything. The district court found, however, that Jones was within ten to twenty feet of Talley's car, and that the car was illuminated by its dome light. The dome light was lit because, after initially being stabbed, Talley's arms and head prevented the car door from closing. Opinion at 54-55. Jones's testimony was consistent with the facts observed at the crime scene, and Johnson and Tipton have failed to make the requisite showing of falsity.

2.

Tipton also asserts that the prosecution improperly withheld exculpatory evidence from his counsel, in violation of due process and *Brady*, regarding the witnesses "Wildman" Stevens, John Knight, and Stoodie Green. In order to establish a *Brady* violation, Tipton was required to demonstrate that the information at issue was "favorable to

the accused"; that it was "suppressed by the [Government], either willfully or inadvertently"; and that prejudice to the defense ensued. *Strickler* v. *Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The district court held that Tipton failed to establish a *Brady* violation, *see* Opinion at 57, 63-64, and we agree.

Tipton contends, first of all, that the prosecutors knew, and yet failed to disclose, that the witness Stevens had denied receiving a knife from Tipton, and that this information would have refuted Jones's testimony that Tipton gave Stevens a bloody knife on the night of the Talley murder. As for this claim, the district court found that there was no evidence that Stevens actually conveyed this information to the prosecution. *Id.* at 57. Accordingly, this contention fails under the second *Brady* prong.

Second, Tipton asserts that the prosecutors knew of, and yet also failed to disclose, statements by the witnesses John Knight and Stoodie Green providing Tipton an alibi on the night of the Stoney Run murders. Tipton's *Brady* claims must fail, however, because, "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States* v. *Wilson*, 901 F.2d 378, 381 (4th Cir. 1990). We have explained that information actually known by the defendant falls outside the ambit of the *Brady* rule. *Fullwood* v. *Lee*, 290 F.3d 663, 686 (4th Cir. 2002). Obviously, Tipton knew who he was with on the evening of the Talley murder—he had no need for the Government to provide him with such information. Thus, no *Brady* violation has been shown, and we affirm the district court's ruling on the issue.

D.

We turn next to the Defendants' multiple challenges to the district court's conduct of their habeas corpus pro-

ceedings. These contentions include (1) their challenge to the standard utilized by the court in assessing their discovery requests; (2) their contention that the court abused its discretion in awarding summary judgment to the Government without first according them an opportunity to conduct discovery; and (3) their assertion that the denial of their motion for leave to interview jurors was erroneous.

1.

Other than authorizing Tipton to conduct forensic testing of a knife found at the Talley murder scene, the court denied the Defendants' broad motions for authority to conduct discovery in their habeas corpus proceedings. *Johnson* v. *Pruett*, No. 3:97CV895 (E.D. Va. May 3, 2000). Pursuant to Rule 6(a) of the Rules Governing § 2255 Proceedings, a prisoner may engage in discovery only "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants him leave to do so, but not otherwise." The Defendants contend that the district court utilized an incorrect legal standard in assessing their discovery requests. And the Defendants assert that, regardless of the standard employed, such discovery should have been authorized. We are constrained to disagree.

In denying the request for discovery, the court explained the standard it was utilizing:

> The Supreme Court determined in *Harris* v. *Nelson*, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), and its progeny, *Bracy* v. *Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997), that 'good cause' for discovery exists when a petition for habeas corpus establishes a prima facie case for relief. *See Harris* v. *Nelson*, 394 U.S. at 290, 89 S.Ct. 1082. Specifically, discovery is warranted, "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he

> is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09, 117 S.Ct. 1793 (citing *Harris*, 394 U.S. at 299-300, 89 S.Ct. 1082).

Johnson v. *Pruett*, No. 3:97CV895 (E.D. Va. May 3, 2000). The Defendants assert that the court, in ruling against them, improperly applied a stringent "prima facie" standard under *Harris*, instead of a more forgiving "good cause" standard authorized by *Bracy*. This contention is incorrect. In *Bracy*, the Court cited with approval the discovery standard articulated in *Harris*, merely clarifying the definition of "good cause." *See Quesinberry* v. *Taylor*, 162 F.3d 273, 279 (4th Cir. 1998) (observing that *Bracy* approved the *Harris* standard); *see also Murphy* v. *Johnson*, 205 F.3d 809, 813 (5th Cir. 2000) ("[T]he *Bracy* decision does not lower the grade for discovery in habeas cases, but rather it merely reasserts the standards of *Harris* v. *Nelson* . . . ."). Here, the district court properly applied the good cause standard outlined in *Harris* and *Bracy*, and it did not abuse its discretion in deciding that the Defendants had not shown good cause for the bulk of their discovery requests. The court carefully considered each claim asserted by the Defendants, and it assessed whether the Defendants had shown good cause for discovery. *See Johnson* v. *Pruett*, No. 3:97CV895, at 3-12 (E.D. Va. May 3, 2000). Because the court applied the proper standard and did not abuse its discretion, we affirm its rulings on this issue.[13]

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[13] The district court alternatively held that the Defendants were precluded from further discovery by their failure to comply with Federal Rule of Civil Procedure 56(f), which requires a civil litigant opposing summary judgment to attest in an affidavit that he cannot oppose summary judgment without conducting discovery. We need not reach this basis for denial of discovery because the court did not abuse its discretion in finding that the Defendants had failed to demonstrate good cause.

2.

Johnson and Tipton next contend that the district court abused its discretion in denying their claims of juror misconduct without first granting them leave to interview the jurors. According to Johnson and Tipton, the jurors were exposed to extraneous information during trial, including extensive media coverage, which clouded their judgment.

We have already assessed and disposed of at least one aspect of this claim. During trial, two jurors admitted reading an inflammatory article about the Defendants. One of those jurors was excused by the trial court, but the other, Mr. Cooke, advised the court that the article would not affect his consideration of the case, and he continued to serve. On direct appeal, the Defendants contended that Cooke should have been removed from the jury because he had been exposed to mid-trial adverse publicity. We specifically considered this claim and found no error in the court's decision with regard to Cooke. *Tipton*, 90 F.3d at 891 n. 16. In addition, we agree with the district court that Johnson and Tipton's remaining media-related claims with respect to the jury have been procedurally defaulted by their failure to raise them either at trial or on direct appeal. *See* Opinion at 3.

As to their non-media-related juror misconduct claims, the district court carefully explained that they are so speculative as to be "insufficient to survive summary dismissal, much less summary judgment." *United States* v. *Tipton*, No. 3:92CR68, at 3 (E.D. Va. July 15, 2003). Throughout the trial, the court gave cautionary instructions to the jury concerning both media coverage and other possible outside influences, repeatedly reminding the jurors to avoid such external sources of information. Johnson and Tipton have provided us with nothing to suggest that the jurors violated these instructions. And as we observed in *Gravely*, "[r]equests to impeach jury verdicts by post-trial

contact with jurors are disfavored." 840 F.2d at 1159. Before proceeding down the path of impeaching a jury verdict, a § 2255 movant must make a threshold showing of improper outside influence. *Id.* In this instance, the court did not abuse its discretion in finding that no such showing had been made. *Id.* (explaining that denial of jury investigation is subject to abuse of discretion review). Put simply, Johnson and Tipton have failed to proffer any evidence that the jurors engaged in misconduct or that they were improperly exposed to outside influences. We therefore affirm the court's rulings on the Defendants' request to interview the jurors. *See* Opinion at 3; *United States* v. *Tipton*, No. 3:92CR68, at 3 (E.D. Va. July 15, 2003).

E.

The Defendants also assert multiple other IAC claims, contending that: (1) their lawyers should have further investigated their alleged gang activities in New York and New Jersey; (2) Johnson's and Tipton's lawyers should have requested a "reverse *Witherspoon*" inquiry;[14] (3) Johnson's and Tipton's lawyers failed to present mitigating evidence regarding prison conditions; (4) Tipton's lawyers failed to present adequate defenses to the Talley and Stoney Run murders; (5) Tipton's lawyers failed to make an adequate case-in-mitigation; (6) Roane's lawyers conceded certain aggravating factors; and (7) Roane's lawyers waived his right to voir dire.

As we have explained, the Court in *Strickland* established that an IAC claim has two prongs: (1) that counsel's

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[14] *See Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *Witherspoon* authorized a voir dire inquiry to determine whether a potential juror would always refuse to impose the death penalty. Conversely, a "reverse-*Witherspoon*" voir dire inquiry is utilized to determine the existence of pro-death-penalty bias on the part of a prospective juror. *See Morgan* v. *Illinois*, 504 U.S. 719, 729-34, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

performance was deficient; and (2) that such deficient performance prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052. A defendant asserting an IAC claim must therefore satisfy both prongs, and a failure of proof on either prong ends the matter. *See Williams* v. *Kelly*, 816 F.2d 939, 946-47 (4th Cir. 1987).

Under the first prong of Strickland, we apply a "strong presumption" that a trial counsel's strategy and tactics fall "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. For a lawyer's trial performance to be deficient, his errors must have been so serious that he was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. And the reasonableness of a lawyer's trial performance must be "evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of reasonableness is highly deferential." *Kimmelman* v. *Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *see also Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

In order to establish prejudice under *Strickland's* second prong, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* As explained below, we agree with the district court that the Defendants' remaining IAC claims lack merit, standing alone or viewed in the aggregate.

1.

First of all, the Defendants maintain that their lawyers should have further investigated their alleged gang activities in New York and New Jersey, and that this failure constitutes constitutionally ineffective assistance. They

assert that such an investigation would have led to the discovery of impeaching evidence on certain prosecution witnesses—i.e., that Light was in jail when Saunders supposedly saw him in New York, and that Scott's testimony about gang-related retaliation was false.

Notwithstanding whether counsel's investigation was reasonable, the Defendants have failed to establish prejudice under *Strickland*'s second prong. As the district court explained, substantial negative repercussions would have resulted to the Defendants from the introduction at trial of such impeachment evidence. Opinion at 38. Many of the purported impeaching witnesses had acknowledged being involved in illegal drug transactions with Johnson and Tipton and in pooling their money with Johnson and Tipton to purchase drugs, and Light did not deny that he was a regular source of Tipton's for crack cocaine. *Id.* In addition, none of this evidence would have undermined the overwhelming evidence before the jury that the Defendants were involved in a CCE in the Richmond area, and that their enterprise had distributed illegal drugs and killed on several occasions in order to ensure its success. Accordingly, the Defendants could not have been prejudiced by any purported omissions of their counsel in this regard, and these claims must be rejected.

2.

Johnson and Tipton next contend that, under the principle established in *Morgan* v. *Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), their counsel were constitutionally ineffective in failing to request a specific "reverse-*Witherspoon*" inquiry of all prospective jurors. Under *Morgan*, a capital defendant has the right to an "inquiry sufficient to ensure—within the limits of reason and practicality—a jury none of whose members would 'unwaveringly impose death after a finding of guilt' and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law."

Tipton, 90 F.3d at 878 (quoting *Morgan*, 504 U.S. at 733, 112 S.Ct. 2222). Johnson and Tipton contend that their lawyers failed to ensure that each prospective trial juror was specifically asked whether he or she would always impose a sentence of death. On direct appeal, however, this Court foreclosed the prejudice prong of this contention when, in considering a separate contention concerning voir dire, we concluded that "the district court's inquiry into death penalty attitudes was sufficient to cull out any prospective juror who would always vote for the death penalty." *Id.* at 879. Accordingly, Johnson and Tipton are unable to satisfy *Strickland's* second prong, and their counsel were not constitutionally ineffective for failing to request a reverse-*Witherspoon* inquiry.

3.

Johnson and Tipton next contend that their lawyers were constitutionally ineffective for failing to present mitigating evidence regarding the prison conditions they would face if sentenced to life imprisonment without the possibility of parole. This contention is made in response to a point argued by the prosecutor during closing: "Ask yourself, should they be punished beyond incarceration? I'm not telling you incarceration is nice and a lifetime of incarceration is not punishment. But think about each and every day of their existence in jail. They will wake up, bathe, be fed. They will be able to watch TV, read books. They will be able to use the telephone to talk to their loved ones." Essentially, Johnson and Tipton contend that, had their lawyers explained to the jury that actual prison conditions were more difficult than this benign description would suggest, the jury may have seen a life sentence as sufficient punishment and rejected the death penalty.

As the district court correctly explained, if the lawyers had introduced evidence of prison conditions, the prosecution would simply have been afforded another opportunity to remind the jurors that Johnson and Tipton pos-

sessed a "proven inclination to engineer murders from behind prison walls." Opinion at 77. And the Government could have drawn the stark contrast between prison life and the living conditions of the incapacitated Greene sisters who were critically wounded during the Stoney Run murders. Accordingly, the lawyers acted reasonably in deciding not to describe prison conditions as mitigating evidence.

4.

Tipton next asserts that his counsel were ineffective in their defense of him on the Talley murder counts (Counts Three and Four), and on the Stoney Run murder counts (Counts Twenty-four and Twenty-five). We reject both of these contentions.

a.

Tipton maintains that, based on pathologist Dr. Fierro's testimony, Tipton, who is right-handed, could not have been Talley's murderer. Accordingly, Tipton contends that Hussone Jones's eyewitness testimony must have been false and that his counsel were ineffective in failing to exploit this fact. We disagree. The district court expressly found that "Dr. Fierro's testimony did not suggest that Tipton, who was initially sitting on the right of Talley, could not stab Talley on the right side of his body . . . . Such a diffusion of wounds is consistent with Jones' description . . . ." Opinion at 55. In light of this factual finding, counsel were not deficient in failing to urge the jury to absolve Tipton on the basis of Dr. Fierro's testimony.

Tipton also contends that defense counsel were ineffective in failing to interview and call as a witness "Wildman" Stevens, who, according to an affidavit submitted during the § 2255 proceedings, would have contradicted Jones's testimony that Jones drove Tipton and Roane to Stevens's house immediately after Talley's murder. As the district court found, however, there was no evidence that Tipton had advised his counsel that Stevens could contradict

Jones's description. *Id.* at 58; *see Lackey* v. *Johnson*, 116 F.3d 149, 152 (5th Cir. 1997) (explaining lawyer not ineffective for failing to discover evidence that client knew but withheld). And as the court explained, Tipton's counsel had no reason to believe that it would be fruitful to interview Stevens, considering the fact that the evidence indicated that Stevens was simply another member of the CCE. Opinion at 58. Accordingly, we affirm the court's determination that counsel were not ineffective in defending Tipton on the Talley murder counts.

b.

Tipton also contends that his counsel failed to mount an adequate defense to the Stoney Run murder counts. In particular, Tipton contends that counsel should have called John Knight and Stoodie Green as alibi witnesses. Again, we agree with the district court's denial of this IAC claim. As the court explained, "[c]onspicuously absent from the record is any evidence from Tipton that he told counsel that Stoodie Green or Knight could exonerate him from involvement in the Stoney Run murders." Opinion at 64. We agree with the court that Tipton's counsel was not constitutionally ineffective in his defense of the Stoney Run murders.

5.

Tipton claims that his attorney failed to present an adequate case-in-mitigation at the penalty phase of his trial. In particular, Tipton relies on the absence of evidence from his mother, his paternal grand-mother, and an older woman in whose home he resided in early 1992—specifically contending that these witnesses could have testified to Tipton's unfortunate childhood. Again, we agree with the district court that "[t]he record refutes such a claim," in that counsel presented extensive evidence through both lay and expert witnesses, and succeeded in convincing the jurors to find twelve mitigating factors, a number of which

pertained to Tipton's difficult childhood and his mental deficiencies. Opinion at 77-80. Indeed, the mitigating evidence in the trial's penalty phase was sufficiently compelling to convince the jury to return non-death verdicts on three of the six capital counts against Tipton, despite the existence of numerous and weighty aggravating factors. In light of the compelling mitigation case presented by Tipton's counsel in the trial's penalty phase, the court correctly concluded that their performance was not constitutionally deficient and that Tipton was not prejudiced by the absence of additional witnesses.

6.

Roane maintains that his trial counsel rendered ineffective assistance at the trial's penalty phase in failing to contest—and indeed, in effectively conceding—the sufficiency of the Government's proof of the aggravating factor that the murder of Moody involved substantial planning and premeditation. According to Roane, this concession was error because there was no evidence that he manifested a premeditated intent to kill Moody or that there was substantial planning, or any planning at all. The district court disagreed, and we agree with the district court. The court found that the evidence of substantial planning and premeditation was ample and that, in light of that evidence, "[t]he best hope for Roane was to emphasize the evidence in mitigation rather than challenge the prosecution's solid case on the substantial planning aggravating factor." Opinion at 71; *see Carter* v. *Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (concluding that it was reasonable for counsel to concede client's culpability in order to establish credibility with jury); *Bell* v. *Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) (concluding counsel reasonably conceded defendant's guilt of kidnapping to retain credibility for penalty phase). Because the performance of Roane's counsel was not constitutionally deficient, we affirm the district court.

7.

Relying on *Near* v. *Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963), Roane maintains that a capital defendant may not waive his presence at trial and that his trial attorney was necessarily deficient when, after consulting with Roane, he waived Roane's right to be present during portions of the jury selection process. Roane contends that he was prejudiced as a result because, had he been present throughout voir dire, he would have insisted on using peremptory strikes to remove three jurors who ultimately served on the jury. He maintains that, had those strikes been utilized, the outcome of the trial's penalty phase would likely have been different.

Again, our decision on direct review forecloses this contention. In applying plain error review to Roane's waiver-of-presence claim, we observed that Roane did not offer anything to suggest that he was prejudiced by his intermittent absences from jury voir dire beyond the conclusory assertion that he was presumptively prejudiced. *Tipton*, 90 F.3d at 875-76. Accordingly, Roane is unable to satisfy the second prong of *Strickland*, and we need not consider this issue further.

F.

Johnson maintains that he is mentally retarded and that, under federal law, he cannot be executed. He further contends that his counsel were ineffective for failing to argue this point during sentencing. The district court rejected these contentions, *see* Opinion at 80-84, and we agree.

1.

Under federal law, "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 21 U.S.C. § 848(l); *see also Atkins* v. *Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that execution of mentally retarded defendant constitutes cruel and

unusual punishment under Eighth Amendment). The district court found, based on data of the American Association on Retardation, that an IQ of 75 or below places a person in the retarded category. *Id.* at 80. At the penalty phase of Johnson's trial, Dr. Dewey Cornell, a psychologist, testified that, on October 10, 1992, he had administered a Wechsler Adult Intelligence Scale Test ("WAIS Test"). Johnson exhibited an IQ of 77, which indicated a "generally impaired intelligence," placing him "just above the level of mental retardation." Importantly, Dr. Cornell testified that he knew the significance of finding Johnson's IQ to be above 75 (i.e., this finding would render Johnson death-eligible), and that he double-checked his numbers and consulted colleagues before reaching this conclusion.

Despite Dr. Cornell's evidence, Johnson asserts that he is in fact mentally retarded. In support of this proposition, Johnson points to evidence offered during the penalty phase that his IQ was somewhere between 69 and 74 in 1985, and he relies on a 1996 publication concluding that the WAIS test tends to inflate IQ scores over the years:

> Individuals appear to gain 3-5 IQ points over a ten year period. Since the WAIS-R was published in 1981, this inflation factor could mean that the average IQ could be as high as 105-107 points rather than the accepted value of 100.

Id. at 81 (quoting The Psychological Corporation, *An Introduction to the Wechsler Adult Intelligence Scale*, (3d ed. 1996)). Based on these authorities, Johnson maintains that his actual IQ is below 75 and that his score of 77 is a product of score inflation. As the district court explained, however, Dr. Cornell's evidence that he double-checked his findings and consulted with colleagues before concluding that Johnson was not mentally retarded "belies the suggestion that Dr. Cornell's analysis did not account for possible variations in his testing instrument." *Id.* at 81-82.

Accordingly, Johnson is not barred from execution due to mental retardation.

2.

Johnson next contends that his counsel was ineffective for failing to assert possible IQ-score inflation at sentencing. We agree with the district court that Johnson's trial attorney was not ineffective for failing to raise this issue. Under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. And "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* In this instance, Johnson's lawyer was presented with a mental health report, and he was under no mandate to second-guess that report. *See Wilson* v. *Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (rejecting inmate's claim that counsel should have pursued mental health defenses where psychological report indicated inmate was competent to stand trial). In these circumstances, Johnson's counsel was not constitutionally ineffective in this respect.

IV.

Finally, we turn to the Government's appeal in No. 03-13, challenging the district court's ruling that Roane's counsel, David Baugh, was constitutionally ineffective for failing to properly investigate Roane's alibi defense for the Moody murder. *See* Roane Opinion at 2-11. The court found that Mr. Baugh's investigation into Roane's potential alibi failed both prongs of *Strickland*, i.e., (1) his performance was deficient, and (2) his deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Because the district court erred in concluding that Mr. Baugh's representation of Roane was deficient under the

first prong of *Strickland*, we reverse its vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven.

The district court concluded that Mr. Baugh had a duty to investigate Roane's potential alibi. As the court explained, Mr. Baugh possessed information suggesting that Roane might be telling the truth about staying at the Howard Johnson hotel the night of Moody's murder—(1) Gina Taylor, an eyewitness, claimed that Roane did not commit the murder; (2) Mr. Baugh had received a detailed account of the alibi from Roane, who had been candid about his participation in other crimes; and (3) Carmella Cooley acknowledged that she had visited a hotel with Roane. See Roane Opinion at 9. Armed with this information, we agree that Mr. Baugh had reason to believe that the hotel records could generate an alibi for Roane, and Mr. Baugh was therefore obliged to make a reasonable investigation of them. *See Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052 (explaining that attorney has duty to make reasonable investigation or to make reasonable decision not to investigate). We part company with the district court, however, on its conclusion that Mr. Baugh failed to fulfill this duty.

We review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective, *Smith* v. *Angelone*, 111 F.3d 1126, 1131 (4th Cir. 1997), and we defer to its findings of fact unless they are clearly erroneous. As the district court found, Mr. Baugh, in keeping with his obligation to investigate: (1) interviewed Cooley, who stated that she once accompanied Roane and Reavis to the Howard Johnson but could not verify the date; (2) concluded that Cooley's ignorance of the date and apparent hostility would make her a poor witness; (3) thereafter contacted the Howard Johnson and asked for records of Linwood Chiles renting a room on the evening of January 12, 1992; (4) went to the hotel himself and attempted to locate the records; (5) limited his search to the name "Linwood Chiles," and searched only for records from

January 12, 1992; and (6) found no record of Linwood Chiles being registered at the hotel on the evening of January 12, 1992. Roane Opinion at 5. At this point, Mr. Baugh made the strategic choice to focus on Roane's misidentification defense, with Gina Taylor as his lead witness.

The district court concluded that Mr. Baugh's investigation of the alibi was constitutionally insufficient because he "did not follow through and seek the records with the vigor demanded by the situation." *Id.* at 9. According to the court, "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* With all respect to the district court, we disagree.

As the Supreme Court has explained, a criminal defense lawyer possesses a duty to conduct a pretrial investigation that is "reasonable[ ] under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052; *see also Wiggins* v. *Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). And the strategic decision of Roane's lawyer on the extent of his investigation into the alibi defense "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052; *see also Byram* v. *Ozmint*, 339 F.3d 203, 209 (4th Cir. 2003) (same); *Tucker* v. *Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003) (same). We are obligated by law to make "every effort to avoid the distorting effects of hindsight," *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, and we should evaluate Mr. Baugh's performance "from counsel's perspective at the time of the alleged error and in light of all the circumstances . . . ." *Kimmelman* v. *Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Applying these principles to this situation, Mr. Baugh's performance was constitutionally reasonable and thorough. He interviewed Carmella Cooley, who could not remember when she stayed at a hotel with Roane. He called the hotel and requested records of Linwood Chiles from the *only relevant night*—the night of the murder. And when that search was not fruitful, he went to the hotel and searched for the records himself. Only after this final step in his investigation did Mr. Baugh turn to and focus on Roane's misidentification defense. In these circumstances, we decline to act as a Monday-morning quarterback and second-guess Mr. Baugh's efforts, simply because we are now armed with more information and the benefit of hindsight.

Furthermore, the authorities relied upon by the district court miss the mark, involving situations in which a lawyer has failed to investigate a defense at all or has performed an investigation so minimal that no strategic reason could be given for the failure to investigate further. *See, e.g., United States* v. *Russell*, 221 F.3d 615, 621 (4th Cir. 2000) (finding ineffective representation when lawyer failed to investigate defendant's criminal record after defendant advised counsel that his convictions had been overturned); *Hooper* v. *Garraghty*, 845 F.2d 471, 474-75 (4th Cir. 1988) (explaining counsel deficient in failing to investigate insanity defense, after learning from client, client's family, and prison psychologist of client's insanity); *Hoots* v. *Allsbrook*, 785 F.2d 1214, 1219-20 (4th Cir. 1986) (finding lawyer's decision not to interview eyewitnesses unreasonable); *Nealy* v. *Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985) (finding counsel ineffective in failing to seek evidence from witnesses when client claimed those witnesses committed crime). Unlike the circumstances underlying those decisions, this case does not involve a situation where counsel neglected to investigate, or where his investigation was so cursory that we can

now—eleven years on and with the benefit of hindsight—declare it constitutionally unreasonable.

As the Sixth Circuit aptly explained in *Coe* v. *Bell*, 161 F.3d 320 (6th Cir. 1998), what the lawyer did not miss is "just as (or more) important as what the lawyer missed." *Id.* at 342. Here, Mr. Baugh was diligent and highly effective in his representation of Roane during this litigation—he conferred with Roane, he investigated the crime scene, he located an eyewitness to the Moody murder who provided a physical description of a murderer dissimilar to Roane, he learned that Moody's mother had advised the police that another man had been searching for Moody hours before his murder, and he aggressively and professionally cross-examined the Government's witnesses. Mr. Baugh investigated the possible Moody alibi—a weak one at that—but when the investigation proved unfruitful, he put on a strong misidentification defense. According a "heavy measure of deference" to Mr. Baugh, as we must, his representation of Roane was not constitutionally ineffective. We therefore reverse the vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven.

V.

Pursuant to the foregoing, we affirm the award of summary judgment to the Government in Nos. 03-25, 03-26, and 03-27, and we reverse the district court's award of relief to Roane in No. 03-13.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Case No. 3:92CR68

UNITED STATES OF AMERICA

v.

JAMES ROANE, JR. A/K/A "J.R."

May 1, 2003

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

Richard Tipton, Cory Johnson, and James Roane were indicted on a series of federal crimes, including multiple capital murders, growing out of their concerted drug-trafficking activities, principally in Richmond, Virginia. Count Five charged that on or about January 13, 1992, Richard Tipton and James Roane while engaged in and working in furtherance of a Continuing Criminal Enterprise caused the intentional killing of Douglas Moody in violation of 21 U.S.C. § 848(e)(1)(a). Count Six charged Tipton and Roane with a violation of 18 U.S.C. § 924(c) in conjunction with the murder of Douglas Moody. Count Seven charged Tipton and Roane with violating 18 U.S.C. § 1959 by murdering Douglas Moody. The jury convicted Roane on Counts Five, Six, and Seven, but acquitted Tipton on those same counts. Following a penalty hearing, the jury recommended that Roane be sentenced to death on Count Five, for the murder of Douglas Moody. This Court sentenced

Roane to death in accordance with the jury's recommendation.

After filing an unsuccessful appeal, Roane filed a motion for relief pursuant to 28 U.S.C. § 2255 with this Court. The United States moved for summary judgment. Upon review of the record and the parties' submissions, the Court concluded that Roane was entitled to an evidentiary hearing on his claim that he was denied effective assistance of counsel in conjunction with the charges related to the murder of Douglas Moody (Claim IV.B.2) and his claim that he is actually innocent of the charges related to the murder of Moody (Claim VIII). The Court conducted an evidentiary hearing on those claims on June 21, 2002.

B. Roane's Claim

In Claim IV.B.2, Roane asserts that he was denied effective assistance of counsel by counsel's failure to locate a favorable eyewitness to the murder and adduce available testimonial and documentary evidence to support an alibi defense. In Claim VIII, Roane contends that he is actually innocent of the murder of [ ] Douglas Moody. Roane bases this claim of actual innocence on his alibi evidence that counsel failed to introduce and on the testimony of the purported eyewitness who swears that Roane did not murder Moody.[1]

C. Findings Of Fact

1. In early 1992, Ronita Hollman and Doug Moody were selling drugs in the Newtowne area of Richmond, Virginia, for Peyton Maurice Johnson. Tr. at 1992-93; 2553. Richard Tipton, Cory Johnson, and James Roane decided to take over the drug trade in Newtowne. Tr. at 1156-58, 2330.

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[1] Tr. refers to the trial transcript. Hr. Tr. refers to the evidentiary hearing transcript. Hr. Ex. refers to exhibits introduced at the evidentiary hearing.

2. As part of this plan, Roane and Tipton approached Hollman to lure her away from her association with Peyton Johnson and to sell drugs for them. Tr. at 1962-63. Tipton told Hollman about his plans for the Newtowne area and informed her that they were willing to kill people to accomplish those plans. Tr. at 1963.
3. On or about January 6, 1992, Cory Johnson and Roane left two handguns with their underling, Robert Papoose Davis. Tr. at 1894. On January 11 or January 12, 1992, Roane retrieved one of the guns from Davis. Tr. at 1895.
4. Douglas Moody was murdered around 12:00 a.m. on January 13, 1992. See Gov't Exhibit 119.
5. On January 14, 1992, Roane and Cory Johnson retrieved a bag of weapons they had left at the residence of Robert Davis earlier that day. Roane and Cory Johnson then went looking for Peyton Maurice Johnson. Roane located Peyton Maurice Johnson in a tavern.
6. Roane left the tavern and reported what he had seen to Cory Johnson. Within minutes, Cory Johnson entered the tavern and fatally shot Peyton Maurice Johnson with an automatic weapon.
7. In January of 1992, Louis Johnson was acting as bodyguard for a rival drug dealer in the Newtowne area. While acting in this capacity, Louis Johnson threatened Cory Johnson. On January 29, 1992, Roane got out of his car and shot Louis Johnson. Immediately thereafter, Cory Johnson and Lance Thomas exited Roane's car and continued to shoot Louis Johnson until he was dead.
8. The murders of Douglas Moody, Peyton Maurice Johnson, and Louis Johnson were part of the general plan of Roane, Tipton, and Johnson to take over the drug trade in the Newtowne area.

9. At trial, Denise Berkley testified that, shortly before Douglas Moody was murdered, she was smoking crack at a building on the corner of Clay and Harrison Streets. Tr. at 1694. Berkley heard a shot followed by the breaking of a window from the back of the building. Tr. at 1695-96.

10. Berkley further testified that she went outside and saw Roane stab Doug Moody "18 or 19 times" while Moody pleaded for Roane to stop. Tr. at 1697-98. The knife looked like a butcher's knife. Tr. at 1697. Roane then approached Pepsi Greene, gave her the knife and told her to get rid of it. Tr. at 1699.

11. Finally, Berkley testified that Sandra Reavis was present when Moody was killed. Tr. at 1698-99. Berkley testified that she saw Reavis, Roane, Curt Thorne, Linwood Chiles, and Pepsi Greene leave the scene of the murder in Chiles' station wagon. Tr. at 1699.

12. When the police arrived at the scene of the murder, they found a broken window and a bullet hole in the back of the building where Berkley first heard the sounds of a struggle. Tr. at 1824; Gov't Exs. 9-2 through 9-4, 119.

13. The autopsy of Moody's body reflected that he had been shot twice and stabbed 18 times. The stab wounds were inflicted by a single edged blade. Tr. at 2070-74.

14. At trial, Priscilla "Pepsi" Greene testified that she was on the corner of Clay and Harrison Street when she heard two or three shots. Tr. at 2549. Greene then saw Roane and Tipton exit the house from where the shots were fired. Tr. at 2549. After five or ten minutes, Greene accompanied by Roane, went to Curt Thorne's house, where Roane directed Pepsi to get him the big knife he stored there. Tr. at 2550-51, 2572-3. Later that night, Roane returned the knife, now covered with blood, to Greene and told her to dispose of it. Tr. at

2551-52. Greene threw the knife over the fence. Tr. at 2551.

15. Greene's physical description of the knife was largely consistent with Berkley's testimony and the medical evidence. Tr. at 2583, Gov't Ex. 146.
16. Greene testified that following the murder, Linwood Chiles drove her, Curt Thorne, Roane, and Reavis to Norton Street. Tr. at 2552, 2576. Thereafter, Greene and Thorne stayed on Norton Street, and Roane, Reavis, and Chiles left that location. Tr. at 2576.
17. Robert Davis lived close to the scene of the Moody murder. Tr. at 1893, 2560. Davis testified that, immediately following the Moody murder, he saw Tipton and Roane by the steps near his house and heard them conversing as follows, "Yeah, I got him, I got him . . . we can't stay out here, man. This is hot anyway." Tr. at 1896.
18. The testimony of Berkley, Davis, and Greene was credible and was corroborated by the physical evidence of murder including the autopsy and the crime scene video. See Gov't Ex. 119. Greene's testimony was and remains particularly compelling.
19. Roane was represented at trial by David Baugh and Arnold Henderson.
20. At trial, Baugh called Gina Taylor, a neighbor who had attempted to aid the wounded Moody.[2] Taylor testified that she had seen an individual jabbing the prostrate Moody. Tr. 2902. Taylor testified that the assailant was only about five feet six inches tall and was definitely not Roane. Tr. 2905-6. However, the exculpatory value of Taylor's testimony was undermined by Taylor's

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[2] The knife that appears in the crime scene video, Gov't Ex. 119, is not the murder weapon. Taylor brought this knife out of her home to cut Moody's clothes off so that she could administer first aid. Tr. at 1827-28; 2903-4.

acknowledgment that she could not identify the assailant's gender or see the assailant's face. Tr. 2905-6. Additionally, Taylor's credibility was diminished by her evasive manner on cross-examination and her admission she had "kind of" dated Tipton. Tr. at 2906.

Baugh followed up Taylor's testimony by presenting evidence that two hours before the murder, a person named Keith had come to Moody's mother's house looking for him, and that a week prior, Keith's friends, armed with machine guns, had kicked in the door of Moody's mother's residence while attempting to find Moody. Tr. at 2930-31. Detective Dalton conceded that foregoing information initially had led the police to suspect Keith Barley, a small featured black juvenile male, as Moody's murderer. Tr. at 2928.

21. Prior to trial, Roane told Baugh that he did not participate in the murder of Douglas Moody. Hr. Tr. at 66.

22. Baugh was convinced that Roane did not participate in the Moody murder. Hr. Tr. at 66, 88.

23. Roane told Baugh that on the night of January 12, 1992, he was in a hotel room at the Howard Johnson (hereinafter "the hotel") with codefendant, Sandra Reavis. Hr. Tr. at 66-68, 70-71.

24. The Howard Johnson was located a couple of miles from where Douglas Moody was murdered. The hotel is now a Holiday Inn. Hr. Tr. at 7-8.

25. Roane told Baugh that he and Sandra Reavis were driven to the Howard Johnson hotel by Linwood Chiles. Tr. at 51, 67.

26. Roane told Baugh that Carmella Cooley accompanied them to the hotel. Hr. Tr. at 51, 67.

27. Roane told Baugh that Linwood Chiles registered and paid for the hotel room in cash. Hr. Tr. at 67.

28. In an effort to confirm Roane's alibi, Baugh spoke with Carmella Cooley and attempted to obtain records of Roane's visit to the hotel. Tr. 66-68.

29. Carmella Cooley indicated to Baugh that she had once accompanied Roane and Reavis to the Howard Johnson. Hr. Tr. at 68, 72. However, Cooley could not verify Roane's story that he went to the hotel on January 12, 1992. Hr. Tr. at 68. Baugh concluded that Cooley's ignorance of the date and her apparent hostility made her a bad defense witness. Hr. Tr. at 68.

30. Baugh contacted the Howard Johnson's and asked if the hotel had a record of Linwood Chiles renting a room on January 12, 1992. Hr. Tr. at 66, 71. When Baugh received a negative response from the hotel management, he went to the hotel and attempted to find such a record himself. Hr. Tr. at 66-67.

31. Baugh limited his search to looking for a record of a room rental under the name of Linwood Chiles for the night of January 12, 1992. Hr. Tr. 70-71. Baugh was unsuccessful in finding any such record. Hr. Tr. at 70. Neither Baugh nor the record before the Court suggest that constraints of time or resources played a part in his decision to terminate his search for records corroborative of Roane's alibi.

32. Alfred Brown is an investigator employed by Roane in conjunction with his 28 U.S.C. § 2255 motion. In May of 1998, Brown obtained permission from the hotel management to review the occupancy records for January of 1992. Brown was pointed to several boxes that contained the relevant records. Hr. Tr. at 5. Within three hours, Brown found two registration cards that had been signed by Linwood Chiles. Hr. Tr. at 11; Pet. Hr. Ex. 3. The first card indicates that "Chiles, Linwood" had checked into a room for the night of January 2, 1992 and checked out on January 3, 1992.

Pet. Hr. Ex. 3. The second card indicates that "Chiles, Larry" had checked into a room on January 12, 1992, and checked out on January 13, 1992. Pet. Hr. Ex. 3. Brown also obtained a receipt from the hotel indicating that a "Chiles, Larry" had checked in January 12, 1992, checked out January 13, 1992, and had paid cash for his room. Pet. Hr. Ex. 3. Linwood Chiles' address appears on the face of the receipt and the registration records. Hr. Tr. at 49.

33. In 1992 or 1993, Baugh could have located the same documents discovered by Brown, if he had subpoenaed the records or if he had spent three hours looking through the hotel records.

34. Roane was amenable to testifying in his own defense. Hr. Tr. at 72-73. Baugh advised Roane not to testify unless Baugh could discover some objective confirmation of his alibi for the Moody murder. Hr. Tr. 59; 72-73.

35. If Baugh had discovered the hotel records discussed above, he would have advised Roane to testify. Hr. Tr. at 85-86; 91. Roane would have testified consistent with his testimony at the evidentiary hearing.

36. At the evidentiary hearing, Roane testified that: on the night of January 12, 2002, he, Linwood Chiles, Sandra Reavis, and Carmella Cooley drove to the Howard Johnson in Chiles' station wagon, Hr. Tr. at 45-50; Chiles registered for the room and paid cash. Hr. Tr. at 48; shortly after paying for the room, Chiles and Cooley left, Hr. Tr. 50; Roane and Reavis remained in the room all night and left the next morning, Hr. Tr. at 50.

37. Roane further stated that he "didn't have a weapon at all" in the day or two preceding the murder of Douglas Moody. Hr. Tr. at 37. Roane denied that Davis ever kept a gun for him. Hr. Tr. at 58.

38. Based on Roane's demeanor and the details of his account, the Court finds that Roane's testimony that he was at a hotel at the time of the Moody murder, although not compelling, was tenable.

39. At the evidentiary hearing, Sandra Reavis testified that: on the night of January 12, 1992, she, James Roane, Linwood Chiles, and Carmella Cooley drove to the Howard Johnson in Chiles' station wagon, Hr. Tr. at 14-16; she, Roane and Chiles remained in the car while Cooley registered for a room, Hr. Tr. at 16; thereafter Chiles and Cooley left, Hr. Tr. 16-17. Reavis further testified that Roane stayed in the hotel room with her until they left the hotel at around 10:00 a.m. the next morning, January 13, 1992, Hr. Tr. at 17. Reavis' testimony was flat and unpersuasive.

40. Reavis could not recall when she first told anybody that she was at a hotel with Roane on the night Doug Moody was killed. Hr. Tr. at 24.

41. The Government introduced a letter that Roane had written to Reavis while he was incarcerated awaiting trial. In that letter, Roane indicated that Reavis had requested him to lie and exonerate her by "tak[ing] [the] conspiracy case for [her]". Gov't Hr. Ex. 1 at 2.

42. Prior to the conclusion of her direct appeal, Reavis would not have been willing to waive her Fifth Amendment right to remain silent and provide Roane with an alibi for the Moody murder.

43. At the evidentiary hearing, Demetrius Lavone Rowe testified that at about 8:30 p.m., on January 12, 1992, she had seen Sandra Reavis in the Newtowne area. Hr. Tr. at 97. Rowe testified that Reavis told her she was going to eat with James Roane and then the two of them were going to a hotel. Hr. Tr. at 97. Rowe testified that shortly thereafter she saw Reavis and Roane leave the area. Hr. Tr. at 97. Rowe testified that Reavis and

Roane left the area, not in Chiles' station wagon, but in cab. Hr. Tr. 105-107. Rowe did not see Roane again that night. Hr. Tr. at 99-102.

44. Rowe further testified that she had witnessed the murder of Douglas Moody. Hr. Tr. at 92. Rowe testified that she was on a porch drinking when she heard the sounds of fighting from a nearby house. Hr. Tr. at 94-95. Rowe testified that she then witnessed Doug Moody, Pepsi Greene, Curt Thorne, Richard Tipton, Cory Johnson, and a man she did not recognize spill out of the house across the street. Hr. Tr. at 95-99. Rowe testified that as they came out of the house, Johnson was struggling with Moody. Hr. Tr. 95-99. Rowe testified that Johnson continued to attack Moody after Moody had fallen to the ground. Hr. Tr. at 100. Rowe testified that although she did not recognize the unidentified male, she was sure it was not James Roane. Hr. Tr. at 95.

45. Prior to trial, Rowe did not tell the police or anyone associated with Roane's trial defense what she had witnessed. Roane Third Amend. Memo. Ex. A, Clerk Record #849.

46. Roane failed to present any evidence to suggest that a reasonable investigation by trial counsel would have led to the discovery of Rowe as a witness to the murder of Douglas Moody.

47. Rowe's testimony, to the extent it exculpated James Roane for the murder of Doug Moody, was not credible and would carry no weight with a jury. This conclusion is based on Rowe's demeanor, the fact that Rowe's current version of events conflicts with the earlier versions provided § 2255 counsel and to the Court, wherein she swore that Pepsi Greene was not at the scene of the murder of Douglas Moody. Roane Third

Amend. Memo Ex. A., Clerk Record #849; Roane Reply Memo Ex. B.

D. Conclusions of Law

1. Ineffective Assistance of Counsel

a. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Supreme Court held that to demonstrate the ineffective assistance of counsel, a defendant first must show that counsel's representation was deficient and, then, must establish that the deficient performance prejudiced the defense. *Id.* at 687. To satisfy the deficient performance facet of *Strickland*, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. The prejudice facet of the *Strickland* test requires the defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

b. Roane contends counsel was deficient for not calling Rowe as witness and for failing to present an alibi defense. Roane has failed to demonstrate that counsel was deficient for failing to discover Rowe was a witness or that he was prejudiced by the failure to present her testimony. *See* Findings of Fact 43-47. However, Roane has provided substantial proof for his charge that counsels' investigation of, and subsequent failure to present, an alibi were unreasonable. The Supreme Court has provided the following pertinent guidance for such a claim:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words,

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. The Court further emphasized what investigation decisions are reasonable depends on the information known to counsel and "critically" on the information supplied to counsel by the defendant. *Id.* Counsel obviously had a duty to investigation Roane's alibi and counsel did take steps to confirm that alibi. The critical question here is whether counsel's investigation of the hotel records was reasonable in light of the information known to counsel. *See id.* For the reasons set forth below, the Court concludes that it was not.

Prior to trial, counsel had substantial information that indicated Roane's claim that he was at a hotel at the time of the Moody murder was credible. First, counsel had the testimony of an apparently disinterested eyewitness, Gina Taylor, who insisted that Roane did not commit the murder. Second, counsel had the detailed account of the alibi from his client. Roane's candor with counsel regarding his other criminal acts assured counsel that the alibi was true. Third, counsel's initial investigation, corroborated the details of the account provided by Roane. Although Carmella Cooley could not provide a specific date, she confirmed to counsel that she had accompanied Roane and Reavis to a hotel. With all this information in hand, counsel had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story. Under such circumstances, counsel was obliged to thoroughly review the hotel's records to determine whether they could yield support for an alibi defense. *See Brown* v. *Sternes*, 304 F.3d 677, 694-96 (7th Cir. 2002) (concluding based on facts known

to counsel, counsel was required to conduct an "in depth" investigation of mental health defense).

The record indicates that counsel did not follow through and seek the records with the vigor demanded by the situation. *See id.*; *Hoots* v. *Allsbrook*, 785 F.2d 1214, 1219-20 (4th Cir. 1986) (assuming counsel was deficient when he decided not to carry his investigation of possible eyewitnesses past review of police reports where client pressing an alibi defense); *Cf. United States* v. *Russell*, 221 F.3d 615, 621 (4th Cir. 2000) (concluding counsel was deficient for relying on the government's representation of defendant's criminal record where his client has informed him that such record was not accurate). The Court does not doubt counsel's testimony that he called the hotel a couple of times and on one occasion he went to the hotel to find the records. However, counsel did not volunteer any details regarding his search and the quantum of evidence presented at the evidentiary hearing indicates the search was very limited in scope and duration. Counsel was looking only for a hotel registration record in the name of Linwood Chiles for January 12, 1992. Hr. Tr. at 70-71. When his search did not readily yield such a record, counsel simply terminated his investigation, discarded the alibi defense and concentrated on the misidentification defense.

Under the circumstances facing trial counsel, reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed. *See Nealy* v. *Cabana*, 764 F.2d 1173, 1178-1180 (5th Cir. 1985) (criticizing counsel for not utilizing a subpoena to confirm his client's alibi.) Counsel failed to take such actions and that failure was constitutionally deficient. *Hooper* v. *Garraghty*, 845 F.2d 471, 474-75 (4th Cir. 1988) (concluding counsel was deficient when he discarded insanity defense after limited

exploration of that defense); *Proffit* v. *Waldron*, 831 F.2d 1245, 1248-49 (5th Cir. 1987) (concluding counsel was deficient where counsel made some exploration of a defense but failed to take an obvious and readily available investigatory step which would have made the defense viable); *Sullivan* v. *Fairman*, 819 F.2d 1382, 1391-92 (7th Cir. 1987) (concluding perfunctory attempts to contact witnesses were not reasonable). The Court finds that counsel's failure to obtain corroborative records of Roane's alibi and the subsequent failure to present an alibi defense at trial is attributable to the unreasonably limited amount of time and resources counsel devoted to looking for corroborative hotel records. *See Brown* v. *Sternes*, 304 F.3d 677, 694-96 (7th Cir. 2002) (concluding counsel was deficient for prematurely abandoning mental health defense); *Jennings* v. *Woodford*, 290 F.3d 1006, 1015 (9th Cir. 2002) (counsel was ineffective when he ruled out mental health defense in favor of alibi defense after only preliminary investigation into mental health defense).

c. "[A]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial.]" *Id.* at 694. In the present case, Roane has met that burden.

Had counsel conducted an adequate investigation, he would have found the records which offered some objective support for Roane's assertion that he was at a hotel when Douglas Moody was murdered. Findings of Fact 32-33. Armed with these records, Roane would have testified that he was at a hotel at the time of the murder of Douglas Moody. Findings of Fact 34-35. The alibi would have been

somewhat corroborated by the introduction of the hotel records that indirectly supported that testimony. Of course, the impact of this evidence must be evaluated in light of the strength of the government's case at trial, *Strickland*, 466 U.S. at 697.[3] As recited above, *see* Findings of Fact 1-18, although the evidence of Roane's guilt was strong, it was neither undisputed nor overwhelming and hinged primarily on the testimony of Pepsi Greene and Denise Berkley. But for counsel's deficiency, Roane would have presented an alibi defense consisting of Roane's testimony and marginally corroborative hotel records. See Findings of Fact 32, 34-38, 42. Although thin, the foregoing alibi evidence would have bolstered Roane's plausible misidentification defense and is of sufficient credence to create a reasonable probability that Roane would have been acquitted of the charges related to the murder of Douglas Moody. *See Griffin* v. *Warden*, 970 F.2d 1355, 1358-60 (4th Cir. 1992) (emphasizing the strength of an alibi to challenge an eyewitness identification); *Nichols* v. *Butler*, 953 F.2d 1550, 1553-54 (11th Cir. 1992) (concluding defendant was prejudiced by counsel's actions which prevented defendant from testifying on his own behalf); *Sullivan* v. *Fairman*,

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[3] In evaluating the potential prejudice of omitted evidence, the Court must also consider any negative aspects that would accompany its introduction. *Whitley* v. *Bair*, 802 F.2d 1487, 1494-97 (4th Cir. 1986). Taking the stand was an occasion fraught with peril for Roane. To maintain any semblance of credibility before a jury, if questioned, Roane would have to acknowledge among other things his participation in the plans to take over the drug trade in the Newtowne area and in the murders of Peyton Maurice Johnson and Louis Johnson. However, the Government forsook the opportunity to bolster its theory that Moody's murder was the first in a series of murders related to the plans to take over the drug trade in the Newtowne area. At the evidentiary hearing, the Government did not require Roane to provide details regarding his participation in the plans to take over the drug trade in the Newtowne area and the murders of Peyton and Louis Johnson.

810 F.2d 1382, 1392-1393 (7th Cir. 1987). Accordingly, Roane is granted relief on his claim that he was denied effective assistance of counsel with regard to the murder of Douglas Moody.

2. Actual Innocence

a. "Claims of actual innocence, whether presented as freestanding ones, *see Herrera* v. *Collins*, 506 U.S. 390, 417, (1993), or merely as gateways to excuse a procedural default, see *Schlup* v. *Delo*, 513 U.S. 298, 317 (1995), should not be granted casually." *Wilson* v. *Greene*, 155 F.3d 396, 404 (4th Cir. 1998). Here, the Court reviews Roane's claim under the more lenient standard for gateway claims set forth in *Schlup* v. *Delo*, 513 U.S. 298 (1995). The proper test for whether a petitioner has established that his case is "extraordinary" enough to fall into that "narrow class of cases," which "implicat[e] a fundamental miscarriage of justice," is whether that petitioner has shown that, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 315, 327; *see also O'Dell* v. *Netherland*, 95 F.3d 1214, 1249-50 (4th Cir. 1996) (en banc). It is not, however, this Court's "independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. This standard is more demanding than the standard for demonstrating prejudice under *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). *Schlup*, 513 U.S. at 327 n. 45; *Sullivan* v. *Freeman*, 819 F.2d 1382, 1392-4 (7th Cir. 1987).

b. The Supreme Court has emphasized that to be credible a claim of actual innocence must be supported with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because

such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup*, 513 U.S. at 324. The Court then must evaluate "petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Id.* at 328 (quoting *Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)).

d. Viewed alongside the other evidence, Roane's new evidence fails to demonstrate that no reasonable juror would have convicted Roane of the offenses related to the murder of Douglas Moody. *See Wilson* v. *Greene*, 155 F.3d 396, 404-05 (4th Cir. 1998). Roane's assertion of innocence relies primarily on the testimony of three witnesses, Demetrius Rowe, Sandra Reavis, and James Roane, none of whom are particularly trustworthy. *See Schlup*, 513 U.S. at 324. As discussed above, Rowe's testimony appears to be a fabrication and would carry no exculpatory weight with a reasonable juror. *See* Findings of Fact 43-47. Indeed, the only impact Rowe's testimony would have upon a reasonable juror would be to view with greater skepticism Roane's proffered alibi. Both Roane and Reavis testified that Linwood Chiles drove them to the hotel in his station wagon. Rowe testified that she saw Roane and Reavis leave to go to the hotel, not in Chiles' station wagon, but in a cab. *See* Finding of Fact 40.

Next, a reasonable juror would have to weigh the testimony of Reavis and Roane. The credibility of their testimony is enhanced by the fact that they both agreed on the basic details of the alibi. For example, both Roane and Reavis testified that they were accompanied to the hotel by Carmella Cooley and Linwood Chiles and that Chiles and Cooley left them alone at the hotel for the night. A juror also would consider significant that hotel records confirmed

Roane's statement that Linwood Chiles had paid cash for a room early in the evening on January 12, 1992. However, the value of those records would be diminished by the fact that according to Berkley and Greene, Reavis and Roane continued to employ Chiles as chauffeur after the time of check-in and used his services to depart the scene of the murder. Thus, acceptance of Roane's alibi would turn primarily on whether a juror believed the naked testimony of Reavis and Roane that they did not leave the hotel room until after Moody had been killed.

A reasonable juror would regard with skepticism Reavis' testimony because she was Roane's lover and his lackey in the criminal enterprise and two witnesses had placed her at the murder scene in the company of Roane. Such skepticism would be furthered deepened in light of the late hour of Reavis' testimony and her inability to recall when she first told someone that she was at the hotel with Roane when Doug Moody was murdered. *See* Finding of Fact 40. *Cf. Herrera* v. *Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J.) (concurring) (noting that courts treat last minute affidavits with some skepticism, because "[i]t seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him."). Finally, a juror would be confronted by correspondence between Roane and Reavis which indicated Reavis' desire that Roane tailor his story to exonerate her. *See* Finding of Fact 41. All these circumstances, along with Reavis' demeanor, would cause a juror to harbor serious doubts about Reavis' veracity.

Roane's self-serving testimony of an alibi unsupported by a credible, unbiased witness or firm objective proof is not the sort of evidence one would deem inherently reliable or trustworthy. *See Schlup*, 513 U.S. at 324. However Roane's demeanor at the evidentiary hearing and his ability to recall many of the specific details of the events surrounding the murder of Douglas Moody lent some credence to his testimony. *See* Finding of Fact 38.

Nevertheless, Roane's thin alibi, even when coupled with Gina Taylor's testimony, and the evidence suggesting third parties wished to do Moody harm, is not sufficiently compelling to preclude many a reasonable juror from finding Roane guilty of murdering Moody in light of the formidable direct and circumstantial evidence of Roane's guilt.

Three credible witnesses placed Roane at or around the scene of the murder: Robert Davis testified that he saw Tipton and Roane in the vicinity of the murder shortly after the murder[4], Finding of Fact 12; Denise Berkley gave a detailed account of the events leading up to the murder and actually saw Roane stab Moody; and Pepsi Greene's compelling testimony largely corroborated the details of Berkley's account and placed the bloody murder weapon in Roane's hand immediately following the slaying. A reasonable juror would tend to credit the foregoing testimony in light of Greene and Berkley's demeanor and because their accounts were largely consistent with each other, the evidence at the crime scene, and the autopsy. Findings of Fact 9-15. Furthermore, Roane's new evidence of innocence does not diminish the substantial evidence that indicated Roane stabbed Moody to death as part of a plan to take over the drug traffic in the Newtowne area. See findings of Fact 1-8. Specifically, that evidence demonstrated that Roane was involved in the initial planning to take over the drug trade in the Newtowne area. In furtherance of that plan, the day after Moody was killed, Roane participated in executing Moody's superior in the drug trade, Peyton Maurice Johnson. Then, roughly two weeks later, Roane participated in killing another individual who was an obstacle to the plan to take over the drug trade in Newtowne area, Louis Johnson. Roane's assertion that

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[4] Moody was shot and stabbed. Davis testified that Roane had acquired a firearm shortly before Moody was murdered.

he spent the night of Moody's murder languishing in a hotel room with his girlfriend, does not sit comfortably alongside Roane's proven participation in the other aspects of the plan to take over the drug trade in the Newtowne area. Accordingly, Roane has failed to demonstrate that, in light of all the evidence, one reasonable juror would have found him guilty of the charges related to the murder of Douglas Moody. Claim VIII will be dismissed.

An appropriate Order will issue.

/s/ James R. Spencer
United States District Judge

Richmond, Virginia
Date: 5-1-03

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Case No. 3:92CR68

UNITED STATES OF AMERICA
v.
RICHARD TIPTON A/K/A "WHITEY"
CORY JOHNSON A/K/A "O"
JAMES ROANE, A/K/A "J.R."

May 1, 2003

MEMORANDUM OPINION

The matter is before the Court on the 28 U.S.C. § 2255 motions filed by Tipton, Johnson, and Roane (collectively "the Defendants") and the United States' motions for summary judgment.[1] Tipton, Johnson and Roane's grounds for relief are set forth in appendices A, B, and C respectively. For the reasons set forth below, the Court finds that the United States is entitled to summary judgment on all claims except for a portion of Roane's claim that he was denied effective assistance of counsel in conjunction with the charges pertaining to the murder of Douglas Moody (Claim IV.B.2) and Roane's claim that he is actually innocent of the murder of Moody (Claim VIII).

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[1] The general facts that led to the Defendants' convictions and sentences of death are set forth in *United States* v. *Tipton*, 90 F.3d 861 (4th Cir. 1996) and will not be repeated here. References to the "record" in this opinion do not include the evidence introduced at the evidentiary hearing conducted on June 21, 2002.

I. STANDARD FOR SUMMARY JUDGEMENT

It is the responsibility of the party seeking summary judgment to inform the Court of the basis for its motion, and to identify the parts of the record which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). "[O]nce the moving party has met its burden under Rule 56(c), the adverse party 'may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Catawaba Indian Tribe* v. *South Carolina*, 978 F.2d 1334, 1339 (4th Cir. 1992) (quoting Fed. R. Civ. P. 56(e)). In determining whether a particular claim is subject to summary judgment the Court "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

The Defendants contend that summary judgment is premature because they need to conduct further discovery. The Defendants' unsworn arguments regarding discovery (which already have been rejected by this Court in denying their motions for discovery) do not provide an adequate basis for forestalling a decision on the motion for summary judgment. *See Evans* v. *Technologies Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996). A demand for additional "discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit . . . and the failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Id.* (quoting *Paddington Partners* v. *Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994)). Because the Defendants have not met the burden of demonstrating that they are entitled to discovery, *see* Rule 6(a) Governing § 2255 Proceedings, and have not complied with the

requirements of Fed. R. Civ. P. 56(f), the Defendants' request to forestall summary judgment until they can conduct additional discovery will be denied.

II. PROCEDURAL STANCE OF THE DEFENDANTS' CLAIMS

Review of many of the Defendants' claims is precluded because the claim was rejected on direct appeal, *see Boeckenhaupt* v. *United States*, 537 F.2d 1182 (4th Cir. 1976) (intervening change in the law is required to relitigate issues in § 2255 motion that were rejected on direct appeal), or the claim could have been raised at trial and direct appeal, but was not. *United States* v. *Frady*, 456 U.S. 152, 168-69 (1982). Specifically, the following claims will be dismissed because they were rejected on direct appeal and the Defendants failed to direct the Court to a change in the law that requires the Court to revisit the claim: Tipton Claims V.B.3.b, V.G, V.H; Johnson Claims II.C.2, VIII, IX; and Roane Claim V, and those aspects of the juror misconduct claims relating to mid-trial publicity and juror Cooke, Tipton Claim V.A, Johnson Claim VII, and Roane Claim III.[2] *See United States* v. *Wiley*, 245 F.2d 750, 752-53 (8th Cir. 2001) (concluding new facts do not require review of claims rejected on direct appeal), *cert. denied*, 122 S. Ct. 818 (2002).

The Government correctly notes that the Defendants have defaulted the following claims by failing to raise the claim either at trial or on direct appeal: Tipton Claims V.B.3.a.i, V.B.3.a.ii-iv, V.B.3.c, V.E. 1-15, V.J, V.K, V.L; Johnson Claims II.C.I.a-c, II.C.3.a, II.C.3.b, V.A-V.M, VI,

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[2] The Government also is correct that the new facet of the Defendants' juror misconduct claim, is defaulted because it could have been raised at trial and on direct appeal but was not. *Frady*, 456 U.S. at 168-69. The Defendants fail to demonstrate any cause to excuse the new aspect of the juror misconduct claim. *See* Order entered June 10, 1998 and *infra* Sec. XII and XIII.

XII, XIII; Roane Claims I.a, I.d, II, VII. *Frady*, 456 U.S. at 168-69. The Court may grant relief on the foregoing claims only if the Defendant demonstrates that either cause and actual prejudice, or actual innocence excuse his default. *See Bousley* v. *United States*, 523 U.S. 614, 622 (1998). Hence, with respect to these defaulted claims, if the Defendant fails to demonstrate that either novelty, or ineffective assistance of counsel, or actual innocence, or some other cause, excuses his default, the claim will be dismissed without further discussion. As discussed below, except for part of Roane's Claim VIII, the Defendants' proffered excuses are unconvincing and are rejected.

III. RELIEF BASED ON *APPRENDI* v. *NEW JERSEY*

Johnson Defaulted Claim XIII

Tipton Defaulted Claim V.L

Roane Defaulted Claim VII

Title 21 U.S.C. § 848(e) provides that any person who, while engaged in or working in furtherance of a continuing criminal enterprise ("CCE"), "intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual" may be sentenced to death or a term of imprisonment from twenty years to life. However, before the death penalty may be imposed, the jury is required to find the presence of certain aggravating factors enumerated in 21 U.S.C. § 848(n). In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490. The Court also explained that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." *Id.* at 489 n. 15 (quoting *United States* v. *Reese*, 92 U.S. 214, 232-33 (1875)). Relying on the foregoing statement from *Apprendi*, the Defendants contend that

their convictions and sentences of death are unconstitutional because the indictment failed to charge the aggravating factors that were essential to the imposition of a death sentence.

The United States responds that such a claim is defaulted, barred by the new rule doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989), and lacks merit. *See United States* v. *Sanders*, 247 F.3d 139, 144-46 (4th Cir.), *cert. denied*, 122 S. Ct. 573 (2001). Because the United States' procedural arguments carry the day, it is unnecessary to address the merits of the Defendants' substantive claim.

A. Novelty As Cause

The Defendants assert that their failure to raise the claim on direct appeal should be excused because the legal basis for their claim was not available at the time of direct appeal. In *Reed* v. *Ross*, 468 U.S. 1 (1984), the Supreme Court held that a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause to excuse a procedural default. *Id.* at 16. While novelty continues to be a valid cause for excusing a procedural default, the Supreme Court has narrowed the reach of *Reed* by expanding the interpretation of when a claim may be reasonably available. *See United States* v. *Bousley*, 523 U.S. 614, 622 (1998). In *Bousley* the Court rejected the petitioner's assertion that a *Bailey*-type challenge to his § 924(c) conviction prior to the decision in *Bailey* v. *United States*, 516 U.S. 137 (1995) was not reasonably available, because the "Federal Reporters were replete with cases involving challenges to the notion that 'use' is not synonymous with mere 'possession'." *Id.* at 622. The Court then explained that, even if it appears "futile" to attempt a particular legal argument, that perceived futility "cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Id.* at 623 (quoting *Engle* v. *Isaac*, 456 U.S. 107, 130 n. 35 (1982)).

Following this refined view of novelty, the Fourth Circuit rejected a defendant's assertion that his *Apprendi* claim was not reasonably available at the time of his sentencing in 1998. *See United States* v. *Sanders*, 247 F.3d 139, 145 (4th Cir.), *cert. denied*, 122 S. Ct. 573 (2001). The court explained that the *Apprendi* claim was available in 1998, because

> the germ of Sander's *Apprendi* claim had sprouted at the time of his conviction and there is no reason why he could not have raised it then. Although the court may not have been likely to accept Sanders' argument, Sanders plainly had at his disposal the essential legal tools with which to construct his claim.

Id. at 146 (citing *United States* v. *Smith*, 241 F.3d 546, 548 (7th Cir.), *cert. denied*, 122 S. Ct. 267 (2001)).

The Supreme Court's decision in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), provided Tipton, Johnson and Roane with the necessary tools to construct their *Apprendi* claim. "No one can read *McMillan* without learning that the Court was open to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 256 (1998) (Scallia, J.) (dissenting). Thus, because "the foundation for *Apprendi* was laid long before 1992," the Defendants cannot assert the claim was not reasonably available at the time of their trial and appeal. *Sanders*, 247 F.3d at 145 (quoting *Smith*, 241 F.3d at 548). The Defendants' assertion of novelty as cause is rejected.

The Defendants assert that they are actually innocent of all their convictions under 21 U.S.C. § 848 and thus this Court is permitted to review their defaulted claims. As discussed below at Section VI, such an assertion, with the exception of Roane's claims pertaining to the murder of Douglas Moody, is utterly without merit. Nevertheless,

even though Roane's assertion of innocence regarding that murder is meritorious, this Court is still foreclosed from granting Roane, Tipton, or Johnson relief on their *Apprendi* related claim because of the new rule doctrine.

B. *Apprendi* Created A New Rule Of Constitutional Procedure That Is Not Retroactive To Cases On Collateral Review

New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. *See Teague* v. *Lane*, 489 U.S. 288, 312 (1989). *Apprendi's* requirement that any fact, (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, constitutes a new rule of criminal procedure that is not retroactive to cases on collateral review. *United States* v. *Sanders*, 247 F.3d 139, 146-48 (4th Cir.), *cert. denied*, 122 S. Ct. 573 (2001). The Defendants counter that the extension of *Apprendi* they seek—that all facts necessary to the imposition of a capital sentence must be found by the grand jury and charged in the indictment—is a new rule of substantive, rather than procedural, criminal law. *See United States* v. *Bousely*, 523 U.S. 614, 620 (1998) (concluding *Teague* analysis is not applicable where the Court simply decides the meaning of a criminal statute). The Defendants are wrong. *Sanders*, 247 F.3d at 147 (holding that *Apprendi* "constitutes a procedural rule because it dictates what fact-finding procedure must be employed to ensure a fair trial" and that it "is certainly a new rule of criminal procedure"); *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1327 (2002).

Next, the Defendants assert that the new rule they seek is retroactive because it falls within *Teague's* second exception to non-retroactivity. In order to qualify under that exception, the new rule must be such that, without it, "the likelihood of an accurate conviction is seriously

diminished" and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sanders*, 247 F.3d at 148 (quoting *Teague*, 489 U.S. at 313 and *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990) respectively). In *Sanders*, the Fourth Circuit assumed that a "rule that certain sentencing factors must be proven beyond a reasonable doubt will promote marginally more accurate results." 247 F.3d at 149-50. However, the court then concluded that such a rule lacked the trappings of a truly "watershed" rule because it would not impact all criminal defendants, it would not taint a defendant's entire conviction, and it did not contribute significantly to the core fundamental rights such as the right to counsel, trial by jury, and a finding of guilt beyond a reasonable doubt, but merely answered a subsidiary question about one of those core rights. *Id.* at 150-51; *see O'Dell* v. *Netherland*, 521 U.S. 151, 167 (1997) (noting that qualifying rule should be a "sweeping" change that applies to a large swath of cases rather than a "narrow right" that applies only to a "limited class" of cases); *United States* v. *Mandanici*, 205 F.3d 519, 529 (2d Cir.) (discussing eleven new rules or proposed new rules which the Supreme Court has declined to apply retroactively), *cert. denied*, 531 U.S. 879 (2000).

It logically follows that, if the necessity of a petit jury finding beyond a reasonable doubt on all factors that increase a defendant's maximum sentencing exposure are not of sufficient primacy and centrality to satisfy *Teague's* second exception, then the narrower rule that the Defendants demand, which merely requires a grand jury finding by a preponderance of the evidence on the aggravating factors necessary for the imposition of capital sentence factors, is not. *See United States* v. *Cotton*, 122 S. Ct. 1781, 1784-86 (2002) (concluding omission from the indictment of certain facts necessary to imposition of a particular sentence did not deprive court of jurisdiction to

impose that sentence); *Basden* v. *Lee*, 290 F.3d 602, 619 (4th Cir. 2002) (concluding *Apprendi* based challenges to an indictment are not retroactive to cases on collateral review), *cert. denied*, 123 S. Ct. 446 (2002). Unlike the straightforward application of *Apprendi* rejected in *Sanders*, the extension the Defendants seek would contribute little or nothing toward ensuring an accurate conviction or sentence; the aggravating factors ultimately are found by a jury, beyond a reasonable doubt, before the imposition of a capital sentence. *See Jones* v. *Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000) (holding that "the *Apprendi* rule, at least as applied to the omission of certain necessary elements from the state court information, is neither implicit in the concept of ordered liberty nor an absolute prerequisite to a fair trial"); *United States* v. *Moss*, 252 F.3d 993, 998 (11th Cir. 2001) (stating that "we do not believe *Apprendi's* rule recharacterizing certain facts as offense elements that were previously thought to be sentencing factors resides anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial"), *cert. denied* 122 S. Ct. 848 (2002). Accordingly, the Defendants' Apprendi based claims are barred by the new rule doctrine and will be dismissed.

IV. ISSUES RELATED TO THE SELECTION OF THE JURY

A. Counsel Failed To Move For A Change of Venue

Johnson Claim IV.A.2

Tipton Claim V.F.1.a

Roane Claim IV.A

The Defendants assert that counsel were deficient for failing to move for a change of venue in light of the pretrial publicity. In order to demonstrate he was denied his right to the effective assistance of counsel, a defendant must show that counsel's representation was deficient and that the deficient performance prejudiced the defense.

Strickland v. *Washington*, 466 U.S. 668, 687 (1984). The deficient performance facet of the *Strickland* test "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To satisfy this facet of *Strickland*, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Furthermore, in order to avoid the distorting effects of hindsight, the Court is required to evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

In order to carry a motion for a change of venue prior to trial, counsel is required to demonstrate that the publicity is so inherently prejudicial that trial proceedings must be presumed to be tainted. *See United States* v. *Baker*, 925 F.2d 728, 732 (4th Cir. 1991). However, "[o]nly in extreme circumstances may prejudice be presumed from the existence of pretrial publicity itself." *Id.* (quoting *Wells* v. *Murray*, 831 F.2d 468, 472 (4th Cir. 1987)). Instead, "a trial court customarily should take the second step of conducting a voir dire of prospective jurors to determine if actual prejudice exists." *Baker*, 925 F.2d at 732. A defendant would then be entitled to a change of venue if "voir dire reveals that an impartial jury cannot be impaneled." *Id.*

In assessing whether a change of venue is warranted, not only the volume, but the character and timing of media coverage are critical factors. *See Murphy* v. *Florida*, 421 U.S. 794, 801 n. 4 (1975) (important to distinguish between factual and inflammatory publicity); *Baker*, 925 F.2d 732-33. "The recency of alleged prejudicial publicity is important because '[o]bviously where considerable time has elapsed since publication, the probability or likelihood of impact is appreciably lessened.'" *Baker*, 925 F.2d 732-33 (quoting *Wansley* v. *Slayton*, 487 F.2d 90, 93 (4th Cir. 1973)). The

Defendants rely on fourteen newspaper articles to support their claim that a motion for change of venue was warranted. Of those articles, eleven were printed at least five months prior to the start of the trial in January of 1993. The twelfth article appeared on January 10, 1993, the day that jury selection began, and was largely factual. The thirteenth article concerned a shot fired at detectives carrying witnesses and was printed on January 23, 1993. The final article was the article that appeared on February 9, 1993. With only a single, largely factual article appearing in the five months preceding their trial, counsel reasonably eschewed pursuing a motion for a change of venue based on pretrial publicity. *See Mu'Min* v. *Pruett*, 125 F.3d 192, 199 (4th Cir. 1997) (concluding the 47 articles published over three months prior to defendant's trial did not create a presumption that the court could not select an impartial jury).

Nor did the actual voir dire suggest that it would be necessary to change venue in order to obtain a fair and impartial jury. Of the four jurors, and one alternate juror, who had been exposed to pretrial publicity, each unequivocally stated that nothing in the media coverage would prevent him or her from being a fair and impartial juror. Additionally, the Court's opening instructions further reassured counsel that a change of venue was not necessary to avoid any inflammatory media coverage. At the beginning of the trial, the Court instructed the jury "not to read or listen to anything touching on this case in any way." Tr. at 762. "Now as I said—and this is very important, so I am going to repeat it . . . .You should be insulated from outside forces. And what happens in this courtroom should be what makes up the body of knowledge that will bring you to your conclusions and determinations." Tr. 766. In light of the foregoing, the Defendants have failed to demonstrate that counsel was constitutionally deficient for not moving for a change of venue or that they

were prejudiced by counsel's failure to do so. The above listed claims will be dismissed.

B. The Prosecution's Purported Use of Peremptory Strikes Against Women in Violation of *J.E.B.* v. *Alabama ex. rel. T.B.*, 511 U.S. 127 (1994).

Johnson defaulted Claim V.K, VI

Tipton defaulted Claim V.E.1&12

Roane defaulted Claim II

The prosecution used two peremptory challenges to remove men and eight peremptory challenges to remove women. The Defendants did not raise any objection at trial to the prosecution's purportedly improper use of peremptory challenges. Subsequent to the Defendant's trial, the Supreme Court held that intentional discrimination on the basis of gender by the use of peremptory strikes in jury selection violates the Equal Protection Clause. *J.E.B.* v. *Alabama ex. rel. T.B.*, 511 U.S. 127 (1994). When the Defendants sought to raise the issue on appeal based on the disproportionate number of challenges the prosecution exercised against women, the Fourth Circuit concluded that, "the bare showing of gender discrimination first attempted on this direct appeal does not suffice either to allow first instance consideration by this court (as appellants concede), nor to warrant a remand for first instance consideration by the district court." *United States* v. *Tipton*, 90 F.3d 861, 881 (4th Cir. 1996).

Each of the Defendants asserts that the prosecutor engaged in misconduct by using his peremptory strikes to remove women from the jury. These claims are defaulted because counsel failed to make a contemporaneous objection. The Defendants rely on the constitutionally deficient performance of trial counsel, *see* Tipton Claim V.F.1.c and Johnson Claim IV.A.4, and novelty to establish cause to excuse their default.

1. Purported Deficient Performance of Counsel for Failing to Raise *J.E.B.* Or Prosecutorial Misconduct Claim

Tipton Claim V.F.1.c

Johnson Claim IV.A.4

At the time of the Defendants' trial, the Supreme Court had yet to grant certiorari in *J.E.B.*, and the Ninth Circuit was the only Federal Circuit court to extend *Batson* to strikes based on gender. *See United States* v. *De Gross*, 913 F.2d 1417 (9th Cir. 1990), and 960 F.2d 1433, 1437-1443 (1992) (en banc) (extending *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to prohibit gender-based peremptory challenges in both criminal and civil trials). The Fourth Circuit had explicitly rejected attempts to extend *Batson* to peremptory challenges based on gender and the language of that decision hardly encouraged counsel to continue to raise the issue. *See United States* v. *Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988). "[W]e find no authority to support an extension of *Batson* to instances other than *racial* discrimination." *Id.* (emphasis in original); *see also id.* at 1042-43; *United States* v. *Mitchell*, 886 F.2d 667 (4th Cir. 1989) (rejecting defendants attempt to extend *Batson* to peremptory challenges based on age).[3] In light of the Fourth Circuit's explicit rejection of attempts to extend *Batson* to gender, the Defendants cannot demonstrate that the failure of counsel to object to the prosecution's strikes of female jurors fell below the wide range of professionally competent performance. *See United States* v. *McNamara*, 74 F.3d 514, 517 (4th Cir. 1996) (concluding counsel is not deficient for following the controlling circuit law at the time

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[3] At the time of the Defendants' trial, the Seventh Circuit agreed with the Fourth Circuit. *United States* v. *Nichols*, 937 F.2d 1257, 1262-1264 (7th Cir. 1991) (declining to extend *Batson* to gender), *cert. denied*, 502 U.S. 1080 (1992); *see also United States* v. *Broussard*, 987 F.2d 215, 218-220 (5th Cir. 1993) (same).

of trial); *Kornahrens* v. *Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995); *Honeycutt* v. *Mahoney*, 698 F.2d 213, 216-17 (4th Cir. 1983). Accordingly, the Defendants' claims that they were denied effective assistance by counsel's failure to object at trial to the prosecution's use of peremptory strikes against female jurors will be dismissed.

2. Novelty As Cause For Failure to Raise the *J.E.B.* claims

The Defendants next suggest that, if counsel was not deficient for failing to raise the *J.E.B.* claim, then surely its novelty must constitute cause excusing their default. This is not so. *See Kornahrens* v. *Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (rejecting a similar argument and concluding that "a necessarily stringent procedural hurdle, coupled with a similarly important deference to attorney performance" precluded petitioner from raising challenge for the first time on habeas).

The Defendants contend that the absence of a contemporaneous objection is excused because the claim was not reasonably available in light of the Fourth Circuit's position in *United States* v. *Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988). As discussed in conjunction with the Defendants' *Apprendi* claim, "a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default." *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (quoting *Reed* v. *Ross*, 468 U.S. 1, 16 (1984)). However, novelty or "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Bousely*, 523 U.S. at 623 (internal citations and quotations omitted) (rejecting petitioner's assertion that his *Bailey* claim was not reasonably available at the time of his trial). Here, the Defendants had at their disposal not only the *Batson* decision, but also a federal circuit court decision and several state court decisions that had concluded that

Batson extended to strikes based on gender.[4] Such authorities provided the Defendants with sufficient tools to challenge any improper gender based exercise of peremptory challenges. *See United States* v. *Sanders*, 247 F.3d 139, 145 (4th Cir.), *cert. denied*, 122 S. Ct. 573 (2001). Hence, the Defendants' assertion that the legal basis for their *J.E.B.* claim was not reasonably available must fail. The Defendants' assertions of cause are rejected. The substantive prosecutorial misconduct claims are defaulted and will be dismissed.

C. Trial Counsels' Errors Resulted In The Defendants' Exclusion From Voir Dire And The Loss Of The Right To Participate In Jury Selection

Tipton Claim V.F.1.d

Johnson Claim IV.A.5

Roane IV.C.

On direct appeal the Defendants asserted that their absence from portions of voir dire violated their rights under the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and their right to be present under Fed. R. Crim. P. 43(a). Because the Defendants did not raise a contemporaneous objection at trial, the Fourth Circuit reviewed for plain error. The Fourth Circuit concluded that in order to obtain relief on such a claim, the Defendants would be required to demonstrate "'actual prejudice, i.e., that their absences' affected the outcome of the [trial],' or 'probably influenced the verdict[s]' against them either on the guilt or sentencing phases." *United States* v. *Tipton*, 90 F.3d 861, 875 (4th Cir.

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[4] *Di Donato* v. *Santini*, 283 Cal.Rptr. 751 (1991), *review denied* (Cal., Oct. 2, 1991); *People* v. *Mitchell*, 593 N.E.2d 882 (Ill App. 1992), *aff'd in part* and *vacated in relevant part*, 614 N.E.2d 1213 (Ill. 1993); *People* v. *Irizarry*, 165 App.Div.2d 715, 560 N.Y.S.2d 279 (1990).

1996) (quoting *United States* v. *Olano*, 507 U.S. 725, 734-35 (1993)). The court then concluded that the Defendants could not meet this burden simply by suggesting that if they had been present, the panel would have been composed of different jurors.

> If no more is shown, for example, than that jurors 1, 3, and 5 would have been excluded, this could not suffice to show that their presence caused the finally unfavorable "outcome." Something more, for example, that jurors 1, 3, and 5 in the above hypothetical were demonstrably biased, surely must be shown, and even that might not, under all the circumstances, suffice.

Tipton, 90 F.3d at 876.

Johnson and Tipton assert that had they been present for the entire voir dire, they would have insisted that three of the seated jurors be excused or struck: (1) Frances Hodson, because her husband had killed their son then committed suicide; (2) Bonita Faircloth because her best friend's mother had recently been raped and murdered; and (3) Jerome Harrison, because his brother was a patrolman on the Richmond police force. On direct appeal, Roane suggested that he would have struck these same jurors, to which the Fourth Circuit responded that "even if this were accepted as fact, it would not suffice as a showing of actual prejudice. Nor would the stated bases for his challenges—relationships to law enforcement officers and to the victim of a rape-murder—suffice without more to tip the balance." *Id.* at 876 n. 7. The Defendants have not supplemented their § 2255 motions with any additional evidence that jurors Harrison, Hodson or Faircloth, or any of the other jurors that sat, had any demonstrable bias. Nor have the Defendants presented any compelling argument as to why the Court should doubt the jurors' sworn assurance that they could render a fair and impartial judgment. *Cf. Williams* v. *Netherland*, 181 F.Supp.2d 604, 613-15 (E.D. Va.) (finding juror had implied bias based on her repeated

failure to answers questions in an objectively truthful manner), *aff'd*, 39 Fed.Appx 830 (4th Cir. 2002). Hence, the suggestion that the Defendants were prejudiced by the presence of above listed jurors is rejected.

Next, the Defendants suggest that the jurors might have drawn negative inferences regarding their absence from particular portions of the voir dire. *See United States* v. *Camacho*, 955 F.2d 950, 955-56 (4th Cir. 1992). Here, unlike *Camacho*, the Defendants were not absent for the entirety of voir dire. Each of the Defendants was personally and immediately present during some portions of the overall voir dire from whom all of the regular and alternate jurors were ultimately selected. Furthermore, since the Defendants were present during some portions of the voir dire, there is no reason the jurors would believe the Defendants absence from certain portions of voir dire was any different from a bench conference. Finally, unlike *Camacho* the burden is on the Defendants to demonstrate prejudice, which they have not done;[5] the Defendants failed to explain how the result of their trial might have been different if they had been present for all of voir dire. The above described claims will be dismissed.

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[5] Nor can the Defendants satisfy the prejudice component simply by alleging the lack of an objection forced their direct appeal of the issue to be subjected to a more stringent standard of review. *See Smith* v. *Yago*, 888 F.2d 399, 405 (6th Cir. 1989) (holding that "the district court applied an improper standard of prejudice by looking only to the outcome of Smith's direct appeal and not to the outcome of the entire criminal proceeding").

4. Defense Counsel Failed To Request Voir Dire Pursuant To *Morgan* v. *Illinois*, 504 U.S. 719 (1992).

Johnson Claim IV.A.3

Tipton Claim V.F.1.b

Capital defendants have a "right to an inquiry sufficient to ensure—within the limits of reason and practicality—a jury none of whose members would 'unwaveringly impose death after a finding of guilt' and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law." *United States* v. *Tipton*, 90 F.3d 861, 878 (4th Cir. 1996) (quoting *Morgan* v. *Illinois*, 504 U.S. 719, 733-34 (1992)). Tipton and Johnson contend that counsel were deficient and they were prejudiced because counsel failed to ensure that every juror was specifically asked whether he or she would always impose a sentence of death if they found the defendant guilty of capital murder As recounted by the Fourth Circuit on direct appeal, the record forecloses Tipton and Johnson's unsupported speculation that omissions by counsel resulted in a jury that might have contained individuals who would have been subject to removal under *Morgan*. *Tipton*, 90 F.3d at 878-79. "[T]he district court's inquiry into death penalty attitudes was sufficient to cull out any prospective juror who would always vote for the death penalty." *Tipton*, 90 F.3d at 879.

Undeterred, Tipton and Johnson argue that prejudice is self-evident because the jury sentenced them to death despite the fact that it found twelve mitigating factors as to Tipton and a eighteen mitigating factors as to Johnson. To the contrary, the jury's verdicts demonstrate that its members were not automatically predisposed to impose the death penalty after finding a defendant guilty of a capital crime: the jury failed to recommend the death penalty for three of the six capital counts on which Tipton was

convicted and for two of the three capital counts on which Roane was convicted. *See Stamper* v. *Muncie*, 944 F.2d 170, 177 (4th Cir. 1991) (concluding jury's verdict refuted suggestion that jury would automatically impose the death penalty). The Defendants cannot demonstrate any prejudice flowing from the purported omissions of counsel, hence their claims will be dismissed.

V. CLAIMS OF ERROR RELATED TO THE CCE CONVICTION

In order to convict a defendant of engaging in a continuing criminal enterprise the government must prove:

> (1) [the] defendant committed a felony violation of the federal drug laws; (2) such violation was part of a continuing series of violations of the drug laws; (3) the series of violations were undertaken by defendant in concert with five or more persons; (4) defendant served as an organizer or supervisor, or in another management capacity with respect to these other persons; and (5) defendant derived substantial income or resources from the continuing series of violations.

United States v. *Ricks*, 882 F.2d 885, 890-91 (4th Cir. 1989). As on appeal, the Defendants' challenges are focused on the second, third, and fourth elements.

A. Counsel Failed To Demand A Unanimity Instruction On The Predicate Acts That Constitute CCE Continuing Series Element

Johnson Claim IV.A.7.a	Defaulted Claim XII
Tipton Claim V.F.l.g.4	Defaulted Claim V.K
Roane	Defaulted Claim VI

After the Defendants were convicted and sentenced, the Supreme Court held in *Richardson* v. *United States*, 526 U.S. 813 (1999), that in a prosecution for engaging in a CCE under 21 U.S.C. § 848, the jury "must agree unanimously about which three crimes the defendant committed," to satisfy the statutory requirement that the defendant's

behavior is "part of a continuing series of violations" described in 21 U.S.C. § 848(c)(2). *Id.* at 818-24. Although they had not requested such an instruction at trial, on appeal the Defendants asserted that the failure to give a special unanimity instruction constituted plain error. *United States* v. *Tipton*, 90 F.3d 861, 884 (4th Cir. 1996). The claim was rejected:

> the record plainly indicates that appellants could have suffered no actual prejudice from the lack of a special unanimity instruction on the predicate violation element . . . . By its verdict, it is clear that the jury unanimously found each guilty of at least five predicate violations: the conspiracy charged in Count 1, the drug possession charged in Count 32, and at least three of the § 848(e) murders as variously charged to them. Assuming, without deciding, that unanimity on at least three predicate violations is required to convict, it is clear that unanimity occurred here as to each appellant so that no actual prejudice from the failure so to instruct could be shown. *See United States* v. *Olano*, 507 U.S. 725, 734 (1993) (burden is on defendant to show actual prejudice from forfeited error).

Id. at 885.

In their present motions, the Defendants assert that they were deprived of the effective assistance of counsel by counsel's failure to demand a unanimity instruction on the predicate violation element. However, in order to prevail on such a claim, the Defendants must demonstrate that they were prejudiced by that omission. *United States* v. *Stitt*, 250 F.3d 878, 883 (4th Cir. 2001) (rejecting assertion that *Richardson* error is a structural defect), *cert. denied*, 122 S. Ct. 153 (2002). And, as discussed above, the verdict forecloses the Defendants' assertion that they were prejudiced by counsels' omission. Accordingly, because the

Defendants have not demonstrated any prejudice their claims will be dismissed.

B. Instructions On The Supervision Element

The Defendants' direct challenges to the jury instructions are defaulted. Therefore, the following discussion is primarily confined to assessing whether the failure to raise a particular challenge constitutes ineffective assistance of counsel sufficient to excuse the default.

1. Counsel Was Deficient For Failing To Demand That The Court Instruct The Jury That The Government Must Prove The Element Of Management As Part Of The Element of Supervision For A CCE Organizer

Johnson Claim II.C.4.e Defaulted Claim II.C.1.c

Tipton Claim V.B.3.d.iv, Defaulted Claim V.B.3.a.iv V.F.l.g.3

The Court instructed the jury that in order to convict the Defendants on the CCE Count, the Government must prove beyond a reasonable doubt that "the defendant was an organizer of these five or more other persons, or occupied a position of management or a supervisory position with respect to these five or more other persons." Tr. at 3209. The Court then explained that:

> The term "organizer" and the term "supervisory position" and "position of management" are to be given their usual and ordinary meanings. These words imply the exercise of power or authority by a person who occupies some position of management or supervision.
>
> An organizer can be defined as a person who puts together a number of people engaged in separated activities and arranges them in their activities and in one essentially orderly operation or enterprise.

> A supervisory position can be defined as one who manages or directs or oversees the activities of others.

Tr. at 3212.

The Defendants contend that the given instructions were insufficient because under the syntax of the statute, the jury must be instructed that even an organizer must exercise managerial authority over those whom he organizes. *See United States* v. *Lindsey*, 123 F.3d 978, 986 (7th Cir: 1997); *United States* v. *Jerome*, 942 F.3d 1328, 1332 (9th Cir. 1991) ("We read the statutory language 'or any other position of management' to indicate that an 'organizer' must exercise some sort of managerial responsibility."). However, at the time of the Defendants' trial, the Fourth Circuit had concluded that "while proof of a supervisory or managerial relationship requires a showing of some degree of control by the defendant over the other persons, such proof is not required to show that a defendant acted as an organizer." *United States* v. *Butler*, 885 F.2d 195, 201(4th Cir. 1989). Despite this authority, the Defendants were able to obtain the above described instruction which stated that the term organizer "impl[ied] the exercise of power or authority by a person who occupies some position of management or supervision." Tr. at 3212. Counsel was not deficient for obtaining an instruction more favorable than the law in the Fourth Circuit demanded. Accordingly, the above described claims will be dismissed.

2. Counsel Failed To Demand a Buyer-Seller Instruction

Johnson Claim II.C.4.e.	Defaulted II.C.1.a
Tipton Claim V.B.3.d.iv; V.F.l.g.3	Defaulted Claim V.B.3.a.(i)

The "mere showing of a buyer-seller relationship, without more, is not sufficient under 21 U.S.C. § 848" to demonstrate that a Defendant acted as a supervisor,

manager, or organizer. *United States* v. *Butler*, 885 F.2d 195, 201 (4th Cir. 1988). Thus, Johnson and Tipton fault counsel for not demanding an instruction which stated that individuals who had only buyer-seller relationships with them were not supervised or organized by them.

In *United States* v. *Hall*, 93 F.3d 126 (4th Cir. 1996), the court had instructed the jury that "the term organizer and the term supervisory position and position of management are to be given their usual and ordinary meanings. These words imply the exercise of power or authority by a person who occupies some position of management or supervision." *Id.* at 130. Hall asserted that the jury should have further been told that "individuals who had only buyer-seller relationships with Hall were not supervised or organized by him." *Id.* In rejecting that assertion the Fourth Circuit concluded,

> [t]he instructions plainly allowed the jury to understand the supervisory requirement. The 'usual and ordinary' meaning of manager or supervisor does not include a mere buyer-seller relationship. Buyer-seller relationships are not characterized by 'the exercise of power or authority.' Jurors are competent to understand and apply ordinary concepts like organizer, supervisor and management.

Id. at 130-31. This Court gave instructions identical to the instructions approved by the Fourth Circuit in *Hall*. Tr. at 3212. Accordingly, Tipton and Johnson have failed to demonstrate that counsel were deficient or they were prejudiced by the lack of a buyer-seller instruction and their claims suggesting the same will be dismissed.

3. Counsel Was Deficient For Failing To Demand Additional Instructions On the Identity of the Five Supervisees

Johnson Claim II.C.4.g,	Defaulted Claim
IV.A.7.b	II.C.l.b.(i&ii)
Tipton V.B.3.d.vi;	Defaulted V.B.3.a.ii,
V.F.l.g.1,	V.B.3.a.iii

Tipton and Johnson assert that the prosecution presented the jury with numerous individuals who as a matter of law could not count as supervisees. Therefore, Tipton and Johnson contend that counsel were deficient for failing to demand that the Court (1) instruct the jurors that certain of the named individuals could not count as supervisees, *see United States* v. *Barona*, 56 F.3d 1087, 1096-7 (9th Cir. 1995), and (2) instruct the jurors that they must unanimously agree on the identities of the five individuals supervised by each defendant, *see United States* v. *Jerome*, 942 F.2d 1331 (9th Cir. 1991).[6] Tipton and Johnson's claims in this regard are meritless because (1) they erroneously assume that the given instructions permitted the jury to select people who could not qualify as supervisees; (2) contrary to *Jerome's* and *Barona's* fixation, the supervision element of the CCE statue is concerned with the number of supervisees rather than the identities of those individuals; and (3) they cannot demonstrate a

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[6] In *Jerome*, the government had referred in closing argument to individuals for whom defendant's organization/supervision would have been logically impossible—they were only "the suppliers of his suppliers" in the drug distribution chain. 942 F.2d at 1330. The Ninth Circuit concluded that because the government had presented the jury with a confusing array of individuals, some of whom could be counted as persons managed by a CCE defendant and some of whom, as a matter of law, could not be counted toward the supervision element, "the jurors had to be instructed that they must unanimously agree as to the identity of each of the five people Jerome organized, managed or supervised." *Id.* at 1331.

reasonable probability that they each supervised less than five individuals.

First, Tipton and Johnson's demand for additional instructions, particularly the *Barona* instruction, rests on the flawed assumption that the given instructions would permit the jurors to choose as supervisees individuals who could not be supervisees. The given instructions did not permit the jurors to select as supervisees individuals who could not legally qualify as supervisees. If the evidence was insufficient to prove that any of the alleged individuals was in fact a supervisee, then reasonable counsel would assume that a jury following the Court's instructions would discard that individual from its count. *See United States* v. *Griffin*, 502 U.S. 46, 59 (1991) (concluding that lay juries can be presumed to have rejected factually unsupported grounds, but not legally inadequate ones such as, *e.g.*, one that "fails to come within the statutory definition of the crime").[7] Nor can counsel be faulted for not demanding additional instructions on the possibility that the jury would disregard those instructions in favor of the prosecution's argument because the Court repeatedly instructed the jury that "your source as to the law is the Court", not the lawyers. Tr. at 887. *See* Tr. 3193-95; *United States* v. *Tapia*, 738 F.2d 18, 21 (1st Cir. 1984) (prosecutor's rendition of his version of controlling legal principles not prejudicial when "the judge made clear to the jury that it was the judge's description of the law—not that of either counsel—that was to control").

Second, Tipton and Johnson's assertion that counsel were not acting competently because they failed to demand

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[7] Tipton and Johnson contend that the Government presented the jury with individuals, who "could not as a matter of law be supervisees." However, their arguments as to the vast majority of these individuals rest on the premise that the evidence was insufficient to prove that the individual was a supervisee rather than that it was logically/legally impossible for the individual to be a supervisee.

relief pursuant to *Barona* and *Jerome* ignores the legal landscape at the time of Defendants' trial in February of 1993. *See United States* v. *McNamara*, 74 F.3d 514, 517 (4th Cir. 1996). Although *Jerome* had been decided by the date of the Defendants' trial, every other Court of Appeals that had addressed the issue had concluded that, "the requirement of action in concert with five or more other persons . . . aims the statute at enterprises of a certain size, so the identity of the individual supervisees is irrelevant."[8] *Richardson* v. *United States*, 526 U.S. 813, 829 (1999) (Kennedy, J., dissenting) (citing cases). *See United States* v. *Cole*, 857 F.2d 971, 973 n.1 (4th Cir. 1988) (rejecting defendant's assertion that the jury was required to return a special interrogatory on the CCE count that listed the individuals which he supervised); *cf. United States* v. *Chaklias*, 971 F.2d 1206, 1215 (6th Cir. 1992) (concluding it was not plain error for court to fail to instruct jury as to identity of persons whom defendant could not have been considered to have been managing when court gave instructions very similar to those given here). Accordingly, counsel were not deficient for failing to demand the instructions demanded here by Tipton and Johnson.

Tipton and Johnson also assert that the propriety of a unanimity instruction regarding the supervisees must be reevaluated in light of the decision in *Richardson* v. *United*

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[8] Indeed, the Fourth Circuit affirmed that view in this very case. On direct appeal the Defendants argued that, because the prosecution presented the jury with some individuals who could not be counted as supervisees, it was plain error not to instruct the jurors that they must unanimously agree as to the identity of each of the five people each Defendant organized, managed or supervised. *See* Roane's Reply Brief at 27 (citing *United States* v. *Jerome*); *see also* Roane's Opening Brief at 87 (citing *Jerome*). The Fourth Circuit rejected that claim and concluded that the focus of "this element is on the size of the enterprise . . . rather than the identities of those who make up the requisite number." *United States* v. *Tipton*, 90 F.3d 861, 886 (4th Cir. 1996).

States, 526 U.S. 813 (1999), which held that unanimity is required for the three predicate crimes element. They are wrong. *United States* v. *Stitt*, 250 F.3d 878, 886 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 153 (2002). Even after *Richardson*, the "identity of individual supervisees is irrelevant." *Id.* *Stitt* teaches that Tipton and Johnson cannot demonstrate prejudice in conjunction with their challenges to the supervision element simply by suggesting that the jurors were confused about who could be counted as a supervisee.

> Precise details, like the identities of the underlings supervised by the defendant, are not essential elements of the CCE but rather "merely historical facts as to which the jurors could have disagreed without undermining their substantial agreement as to the ultimate and essential fact of whether the requisite size and level of control existed."

Stitt, 250 F.3d at 887 (quoting *United States* v. *Jackson*, 879 F.2d 85, 89 (3d Cir. 1989)). Rather, it is incumbent upon the Defendants to demonstrate that absent the purportedly improper conduct of counsel or the Government, there is a reasonable probability that the jury would not have concluded that each Defendant supervised or organized the requisite floor of five individuals. This they cannot do. *See infra* Section V.C. Hence, the above listed claims will be dismissed because the Defendants have demonstrated neither deficiency nor prejudice.

C. Claims Pertaining To Proof Of The Supervision Element

As a prelude to their challenges pertaining to the sufficiency of evidence on the CCE count, the Defendants assert that the prosecution engaged in misconduct in the manner in which it proved the CCE count. The Defendants assert that these defaulted claims of misconduct are excused by the ineffective assistance of counsel.

Specifically, the Defendants fault counsel (1) for not objecting to the witnesses' use of the terms "partner" and "worker" as violating Fed. R. Evid. 701 and (2) for not objecting to the testimony by numerous witnesses that was not based on a foundation of personal knowledge.

1. Counsel Failed To Object To Testimony That Purportedly Violated Fed. R. Evid. 602.

Johnson II.C.4.b.	Defaulted	II.C.3.a, V.I
Tipton V.B.3.d.(i)	Defaulted	V.B.3.c.(i), V.E.11

The Federal Rules of Evidence provide that "[a] witness may not testify about a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. However, the "threshold of Rule 602 is low", *United States* v. *Hickey*, 917 F.2d 901, 904 (6th Cir. 1990), thus, a Court may accept a witness's unelaborated assertion of personal knowledge "when other evidence indicates that the witness had a personal connection to the subject matter, there is nothing to suggest that the witness likely did not have or could not have had such knowledge, and its probable absence could be easily shown." *United States* v. *Davis*, 792 F.2d 1299, 1304-05 (5th Cir. 1986). Furthermore, "[b]ecause most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences." *United States* v. *Joy*, 192 F.3d 761, 767 (7th Cir. 1999), *cert. denied*, 530 U.S. 1250 (2000).

Johnson and Tipton list numerous instances where they allege the prosecutor elicited or sought to elicit testimony from a witness that violated Fed. R. Evid. 602. The vast majority of these instances simply did not warrant an objection by counsel because there was a foundation for the testimony or the witness could likely provide one. For example, Johnson and Tipton assert that Denise Berkley testified without any basis of personal knowledge that each

Defendant supported himself by selling cocaine. Tr. at 1674-75. However, Berkley previously had testified that she saw Johnson and Tipton selling drugs, Tr. at 1667-68, and "every day" for a couple of months the Defendants would give her crack 4 or 5 times for performing chores, Tr. at 1669-70. Additionally, in faulting counsel for failing to object to the admission of testimony, Tipton and Johnson fail to acknowledge that "the personal knowledge requirement of Rule 602 does not apply to statements of a co-conspirator admissible as non-hearsay under Rule 801(d)(2)(E)." *United States* v. *Goins*, 11 F.3d 441, 444 (4th Cir. 1993). Thus, Tipton and Johnson unreasonably chide counsel for not objecting each time one of their lackeys testified regarding the position or function of the Defendants and other individuals in their drug enterprise. The witnesses could readily supply the necessary foundation for testimony that the Defendants were "partners," or that certain individuals were "workers" because these witnesses were themselves members of the drug conspiracy and the record reflects that the conspirators regularly referred to each other in such terms. *See Goins*, 11 F.3d at 444; *Davis*, 792 F.2d at 1304; *see also United States* v. *Cantu*, 167 F.3d 198, 204 (5th Cir. 1999) (permitting witness to testify that individual "worked" for the defendant).

Only in the following few instances does the transcript suggest the propriety of an objection pursuant to Fed. R. Evid. 602 would be well-grounded in law:

> Stanley Smithers' testimony that the Defendants purchased drugs when they were not in his presence and his testimony that Keith Ross and Mousey Armstrong were selling cocaine which they obtained from Johnson; Papoose Davis' testimony that Nat Rozier used to bring people by to purchase crack; Priscilla a/k/a "Pepsi" Greene's testimony that Talley and Chiles used to drive the Defendants to New York

to pick up drugs; and Pepsi Greene's testimony regarding the motivation for the Moody murder.

However, with the exception of Pepsi Greene's testimony regarding the Moody murder, the aforedescribed testimony was cumulative of other testimony and was not crucial to the case against the Defendants.

Tipton and Johnson correctly note that Pepsi Greene did not provide a full foundation for her testimony that Little Doug Moody and Peyton Maurice Johnson were killed because Tipton and Johnson "didn't want Maurice and Little Doug to work in that area." Tr. at 2553. However, it is one thing to demonstrate an objection would have been feasible, and quite another to demonstrate the objection would preclude the admission of the testimony which in turn would alter their convictions and sentences. The record reflects that Greene had intimate knowledge of the workings of the CCE and of the events preceding the Moody murder and thus could likely have provided a foundation for her statement. Additionally, as discussed *infra* at Section VII, there was ample evidence which linked the Moody murder to the plan of Tipton, Johnson and Roane to take over the drug traffic in the Newtowne area. Hence, Tipton and Johnson have not demonstrated that Pepsi Greene could not have supplied a foundation for the testimony described above, much less that if that single remark was excluded there is a reasonable probability their convictions and sentences would have been any different. In summary, the majority of this ineffective assistance claim will be dismissed because counsel was not deficient and as to remaining instances where counsel failed to object for a lack of demonstrable prejudice.

2. Counsel Failed To Object To Testimony That Purportedly Violated Fed. R. Evid. 701

Johnson II.C.4.b	Defaulted II.C.3.a, V.I
Tipton V.B.3.d.i,	Defaulted V.B.3.c(i), V.E.13

Federal Rule of Evidence 701 limits lay testimony to those opinions or inferences which are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Fed. R. Evid. 701. A witness' testimony that he considered himself or others to work for the Defendants does not run afoul of either of the requirements of Fed. R. Evid. 701. *See United States* v. *Freerman*, 619 F.2d 1112, 1120 (6th Cir. I980) (permitting witnesses to testify as to their perception of the defendants' relationship). The Advisory Committee's Notes explain that natural characteristics of the adversary system, such as cross-examination and closing argument will point up the weakness of empty assertions and exclusion should be reserved for those instances where the opinions constitute "meaningless assertions which amount to little more than choosing up sides." Fed. R. Evid. 701 advisory committee's notes. Here, counsel followed the foregoing admonition and used cross-examination and closing argument to suggest that the terms worker or employee did not imply the exercise of control by the Defendants. *See e.g.*, Tr. at 2378-80, 2405-08; Tipton Closing Tr. at 3035 ("This worker-partner stuff is baloney. He wasn't their boss. He was their supplier."); Tr. at 3053-55; Johnson Closing Tr. at 3063-68. Moreover, counsel reasonably eschewed objecting to the use of the terms "partner" or "worker" because the witnesses were not offering a legal conclusion but were simply using the terms coined/employed by members of the conspiracy to describe the relationships of different

members of the drug conspiracy.[9] Accordingly, counsel were not deficient for failing to object to the use of the term worker or partner by the witnesses. The above described claims will be dismissed.

2(a). The Prosecutors misled the jury by suggesting that they had not influenced witnesses to use terms "partner," "worker," and "employee."

Johnson Defaulted Claim V.J

Charles Townes, Hussone Jones, and Denise Berkley reiterated Antwoine Brooks' testimony that the terms worker and partner originated from the members of the enterprise, not from the prosecution, and swore that they had not been persuaded to use such terms by the prosecution. Despite this explicit testimony, Johnson asserts that counsel should have known that the prosecution encouraged the witnesses to use those terms by inserting the terms into their questioning of Jones and Townes before the grand jury. In light of the trial testimony directly refuting such a claim of misconduct, counsel can hardly be deemed deficient for failing to raise such a claim based on the nebulous evidence offered by Johnson. Accordingly, Johnson's assertions of cause to excuse his default are rejected. Claim V.J is defaulted and will be dismissed.

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[9] Antwoine Brooks, was the first witness to explain what the terms meant in conjunction with the CCE in Richmond. Tipton asked Brooks to be his "partner" in selling crack in Central Gardens. Brooks explained that he and Tipton recruited Maurice Saunders and Hussone Jones as workers. The workers were fronted $300 crack. The workers were responsible for selling the crack and returning $200 to the partners. When asked on cross-examination if someone had suggested that he use the term "worker," Brooks responded, "[w]e just came up with it. It is true. They worked for us at the time." Tr. at 1085.

3. Counsel Were Deficient For Failing To Demonstrate That Each Defendant Supervised Less Than Five Individuals

Johnson II.C.4.c, IV.A.6

Tipton V.B.3.d.(ii), V.F.3.a, V.F.1.f

Roane IV.D

The Defendants contend that the Government's proof of the supervision was based entirely on misleading testimony. Specifically, the Defendants assert that the term worker simply meant the purchasing of drugs on credit and does not demonstrate a supervisory relationship. The Defendants' argument in this regard ignores the abundance of testimony that indicated that the partners exercised control or supervision over the workers in addition to just providing them drugs on credit. The Defendants' arrangement with their dealers went beyond simple fronting and constituted a consignment or franchise type of operation, with the Defendants retaining ultimate control over the drugs.[10] Brooks explained that people who were simply fronted drugs were not considered workers. Tr. at 1105. And, the workers consistently testified, not that they purchased drugs from the partners, but rather sold drugs "for" the partners. *See, e.g.*, Tr. at. 1542, 1682-83, 2324. Furthermore, Brooks indicated the consignment relationship between partners and workers was an exclusive relationship. Tr. at 1103-4; *see United States* v. *Butler*, 885 F.2d 195, 201 (4th Cir. 1989) (concluding the defendant exercised control over purchaser whose relationship was "analogous to an exclusive franchise dealership"). Maurice Saunders, a "worker", explained that he was not permitted to obtain crack from sources other

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[10] While such a consignment relationship is not sufficient in and of itself to establish supervision, it is probative of that issue. *See United States* v. *Butler*, 885 F.2d 195, 201 (4th Cir. 1989) (citing *United States* v. *Possick*, 849 F.2d 332 (8th Cir. 1988)).

than a partner. Tipton told Saunders, on more than one occasion, "You deal only with me if you value your life." Tr. at 1322. In any event the provision of drugs on consignment to workers was not the only evidence the government adduced to show that each Defendant supervised, organized or managed in excess of five individuals.

> The record reveals—certainly supports findings beyond a reasonable doubt—that these 'retailers,' in more than sufficient numbers as to each of the appellants, acted as 'workers' who were either or both organized, supervised, and managed by appellants while acting as principal 'partners' in a concerted drug trafficking enterprise, and that some of these people served variously not only as street dealers for the enterprise but as sometime chauffeurs, hideout providers, weapons-keepers, and general underlings for each of the appellants.

United States v. *Tipton*, 90 F.3d 861, 890 (4th Cir. 1996). No argument by counsel could have overcome the fact that each Defendant personally organized, managed or supervised in excess of five individuals.[11] Accordingly, the Defendants have failed to demonstrate that they were prejudiced by any purportedly deficient effort by counsel to

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[11] The transcript is simply littered with testimony supporting the supervision element. *See e.g.*: Tipton, Tr. at 1061, 1147, 1161, 1165-66, 1173, 1193, 1196-97, 1199, 1200, 1325, 1330, 1542, 1544, 1545-46, 1556, 1565, 1574-78, 1582, 1683-84, 1689-91, 1888, 2330, 2494, 2546-48, 2550, 2703, 2706-8; Johnson Tr. at 1162, 1582-83, 1683-84, 1690-92, 1705-8, 1711, 1720, 1888, 1891, 1895, 1897, 1899, 1901, 1921, 2321-22, 2340, 2343, 2374, 2546-48, 2550, 2698, 2703, 2706, 2709, 2720; Roane Tr. at 1574, 1682, 1684, 1689, 1705-8, 1888-89, 1895, 1897, 2163, 2172, 2318, 2324, 2337, 2417, 2546, 2550, 2551, 2708. The foregoing evidence also demonstrates that lack of merit of the assertion that the evidence was insufficient to support the supervision element. *See* Johnson Claim II.C.2, Tipton Claim V.B.3.b.

challenge the supervision element. The above described claims will be dismissed.

4. Johnson Contends That Counsel Was Deficient For Failing To Introduce Evidence That Demonstrated That He Was Mentally Incapable Of Acting As An Organizer.

Johnson Claim-II.C.4.a

Johnson asserts that counsel should have adduced evidence of Johnson's low intelligence and learning disabilities to persuade the jury that he was mentally incapable of acting as a CCE organizer. Assuming such evidence would have been admissible in the guilt phase, it would have opened the door to a host of prejudicial evidence and its value to the defense was minimal. Regardless of what any social worker or psychologist may have opined, the record amply demonstrates Johnson was a partner in the CCE and independently directed the activities of his many underlings. Counsel was not deficient for reserving the evidence of Johnson's mental deficiencies, one of the few bolts of mitigation, for use to maximum effect at the inevitable sentencing proceeding. Claim II.C.4.a will be dismissed.

D. Purported Use Of False Testimony To Prove The Existence Of The CCE

The Defendants assert that the government knowingly elicited false testimony from Gregg Scott, Maurice Saunders, and Priscilla "Pepsi" Greene. If the Defendant shows that: (1) the testimony was false, *see Boyd* v. *French*, 147 F.3d 319, 329-30 (4th Cir. 1998); and (2) the prosecutor or other government official knew, or should have known, the testimony was false; *see Stockton* v. *Virginia*, 852 F.2d 740, 749 (4th Cir. 1988); *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir. 1975) (noting that "a recantation, particularly by an accomplice should be received skeptically"), then the conviction must be set aside if (3)

there "is any reasonable likelihood that false testimony could have affected the judgment of the jury." *See United States* v. *Bagley*, 473 U.S. 667, 679 (1985). However, a prosecutor's mere suspicion about testimony is not enough. *See, e.g., Hoke* v. *Netherland*, 92 F.3d 1350, 1360 (4th Cir. 1996) (citing *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 261 (1988) ("Although the Government may have doubts about the accuracy of certain aspects of [evidence], this is quite different from having knowledge of falsity.")). And, "[m]ere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." *United States* v. *Grilley*, 814 F.2d 967, 971 (4th Cir. 1987). The Defendants have garnered affidavits and other documents which they assert demonstrate that Maurice Saunders, Gregg Scott and Pepsi Greene testified falsely.

1. Gregg Scott's Testimony Linking Tipton And His Codefendants To The New York Boyz Was False, And The Government Knew Or Should Have Known That It Was False

Johnson Claim I.B

Tipton Claim V.C.1.b

Roane Claim I.C.1

The Defendants assert that Scott lied when he: (1) stated that he grew up at 155th and Amsterdam in New York; (2) described the New York Boyz as a gang; (3) swore that the New York Boyz met to discuss retaliating against individuals who threatened other members of the gang; and (4) testified falsely when he said he received guns from "Light". The first two statements the Defendants describe as false amount to a difference of opinion, rather than a perjurious statement of a fact. *See United States* v. *Ellis*, 121 F.3d 908, 927-8 (4th Cir. 1997). Additionally, the fact that Tipton and Johnson were associated with a gang in New York/New Jersey area that supplied the Defendants

with drugs is beyond dispute.[12] *See United States* v. *Smith*, 223 F.3d 554, 574 (7th Cir. 2000), *cert. denied*, 122 S. Ct. 2658 (2002). In short, the Defendants have failed to demonstrate Scott's first two statements were false, much less that the prosecution knew they were false.

The Defendants have submitted evidence that creates a question of fact as to whether Scott testified accurately about the retaliation meetings and receiving guns from "Light".[13] However, the Defendants have offered no proof which suggests the prosecution knew, or should have known that these aspects of Scott's testimony were false. *Cf. United States* v. *Biberfeld*, 957 F.2d 98, 102 (3d Cir. 1992) (concluding petitioner was entitled to hearing where he

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[12] Anthony Howlen testified that both Tipton, and Johnson were members of the gang known as the New York Boyz; Anthony Howlen and Richard Brice, a security guard, testified to a retaliatory gang attack over drug matters that involved both Johnson and Tipton; Officer Malone testified that a search of a residence Johnson shared with Scott, Lance Thomas and other purported New York Boyz, turned up guns and a substantial amount of crack; and multiple witnesses testified as to Tipton's comments regarding the New York Boyz, and his ability to call upon them for drugs and assistance. *See also* Tr. at 1072-73, 1684.

[13] At trial Scott was cross-examined regarding his statement that the New York Boyz would meet to discuss retaliating against any individual who threatened one of the members. Counsel asked Scott to describe those incidents where retaliation had taken place. Scott testified that "Smooth" was cut in a fight, after which Scott, Smooth, "Light," "Law," "L.A.", Lance Thomas, Cory Johnson, "Heavy D" and "Gary William" discussed retaliating against the guys who stabbed "Smooth" (Darryl Williams) and, thereafter, attacked the guys who had stabbed "Smooth." Tr. at 968-69. The Defendants have submitted affidavits, wherein "Light", "Hess", "L.A.", and "Smooth" swear that they were never involved in group discussions of retaliation. Tipton Reply Mem. App. at 1, 4, 5 and 6. "Smooth" further avers that he was never stabbed in his life. *Id.* at 6. Additionally, in his affidavit, "Light", a/k/a, Rufus Alvarez, a/k/a John Matthews, avers that he did not give any guns to Scott. *Id.* at 1 ¶ 10.

alleged that prosecution had reviewed files which indicated witness was testifying falsely). Instead, the Defendants speculate that the prosecution knew the testimony was false because it was beneficial to the prosecution. The Defendants then direct the Court to the affidavit of Government witness Sterling Hardy which they suggest demonstrates that the prosecutors pressured witnesses to testify falsely and fed the witnesses the testimony they wanted. The affidavit does not demonstrate that the prosecution knowingly elicited false testimony from Hardy, much less support the claim currently before the Court, that the prosecution knew Gregg Scott testified falsely.[14]

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[14] Indeed, Hardy's affidavit, when compared to his trial testimony, belies the suggestion that the prosecutors permitted or encouraged Hardy to testify falsely to any fact. In his affidavit, Hardy swears that,

> The prosecutors wanted me to say that Richard Tipton was present at the Southside shooting when Torrick Brown was killed. I told them Richard was not there, and I did not want to lye[sic]on him. The prosecutors also wanted me to say that Richard Tipton was present when Louis Johnson was killed. I again told them that Richard was not there.
>
> I was not clear on many of the particulars, [h]owever after Mr. Vick and Mr. Parcell clarified them I was able to testify the way they wanted me to. They told me to tell the truth and be honest, but if I did, I would not have testified the way they wanted me to.
>
> It was my understanding that Mr. Toby Vick instructed my attorney Mr. Everhart to have me say nine words. I did not know what nine words I needed to say until Mr. Everhart told me. He told me to say "James had problems in the Southside, go get Cory and Lance Thomas."

Johnson Reply Memo Ex. A, Aff. 8.

At trial Hardy did not provide any testimony placing Tipton at the scenes of the Torrick Brown and Johnson murders. Nor did Hardy testify that anyone had instructed him to get Johnson and Lance Thomas to help Roane kill Torrick Brown. Furthermore, at trial, Hardy specifically and repeatedly disavowed that anyone had told him how he should testify. Tr. at 2193, 2202, 2243.

Hardy's hopelessly muddy remark that the prosecutors "told me to tell the truth and be honest, but if I did, I would not have testified the way they wanted me to," does not warrant a different conclusion. Such "[a]iry generalities, conclusory assertions and hearsay statements [do] not suffice" to stave off summary judgment or entitle a habeas petitioner to an evidentiary hearing, because none of these would be admissible evidence at an evidentiary hearing. *See United States* v. *Aiello*, 814 F.2d 109, 113-14 (2d Cir. 1987). Simply put, the Defendants have failed to provide any factual anchor for the theory that prosecutors orchestrated false testimony from Scott. *See Blackledge* v. *Allison*, 431 U.S. 63, 80 (1976). The above listed claims will be dismissed.

2. Maurice Saunders' Testimony Linking Tipton to "Light" and Large Sums of Money Was False

Johnson Claim I.C

Tipton Claim V.C.1.a

Roane Claim I.C.2

The Defendants assert that Saunders testified falsely concerning his two trips to New York where he assisted in the purchase of cocaine and purported to see New York Boy, "Light." This claim flows from an apparent misstatement by the prosecutor in questioning Saunders about the date of the first of these two trips:

Q. I direct your attention to after Christmas of 1991; did you have an occasion to make a trip to New York with "Hess"?

A. Yes, I did.

Q. What was the purpose of that trip?

A. To bring back crack cocaine and some vials.

Q. Who were you getting the crack cocaine for?

A. For Rich[Tipton].

Tr. at 1330.[15] Saunders explained that he and Hess went to an apartment building at 155th and Amsterdam to purchase the crack.

Q. Who did you see there?

A. I saw a few other people. Pointed out to me was a guy named "E.B." and pointed out to me was a dude named – he said "Light," I think it was "Light". I'm not sure.

Tr. at 1331. Hess then went into the apartment with $18,000 and emerged with roughly a kilo of crack. Tr. at 1333.

About a month after the first trip, Saunders accompanied Tipton, with $40,000, to New York, back to the same apartment building to buy two and half kilograms of cocaine. Tr. at 1336-37.

Q. Who did you see up there?

A. I saw the same faces.

Q. Did you see "Light" again?

A. Yes. I did.

Tr. at 1336-37.

The Defendants insist that Saunders testified falsely when he said he observed "Light" on each of these trips. In support of this claim, the Defendants direct the Court to (1) an affidavit from "Light" and criminal records which

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[15] By his question, the prosecutor suggested to Saunders that the first buying trip took place after Christmas in 1991. However, the whole of Saunders' testimony indicates the trip actually took place in late November or early December of 1990 and the second trip took place in January or February of 1991. Specifically, Saunders stated that he went to New York at about the same time Tipton promoted him and after he moved in with Tipton. Tr. at 1321, 1325. The move and promotion occurred in late November, Tr. at 1324, or early December of 1990. Tr. at 1320-21. Indeed, Hussone Jones, Saunders' brother, swore the first trip took place in the fall of 1990, around Christmas. Tr. at 1550.

demonstrate that "Light" was incarcerated from December 3, 1990 to April 2, 1996, the period wherein the drug buying trips purportedly occurred and (2) an affidavit from Hess wherein he swears that he never pointed out "Light" to Saunders and that they merely purchased clothes, rather than crack on their trip. The Defendants have not adduced any evidence that the prosecution was, or should have been aware of "Light's" incarceration[16] at the time of the buying trips. *See Horton* v. *United States*, 983 F. Supp. 650, 654-55 (E.D. Va. 1997) (rejecting petitioner's assertion that, for *Brady* purposes, federal prosecutor is charged with knowledge of state prison records) or had obtained information from "Hess" regarding his version of the first trip to New York. Instead, the Defendants assert that the prosecution knew that Saunders' testimony in this regard was false because it had "orchestrated" Saunders' testimony to corroborate Scott's testimony, i.e., that the prosecution told Saunders to tell the jury that he had seen "Light" on his trips to New York. Neither this palpably incredible allegation nor the inconclusive affidavit from Sterling Hardy substantiate the charge that the prosecutors were aware of any inaccuracies with regard to Saunders' testimony. *See McBride* v. *United States*, 446 F.2d 229, 232 (10th Cir. 1971) (summarily dismissing § 2255 motion for failure to specifically advise the district court as to how he intended to factually prove his allegation of a knowing use of perjured testimony). The lack of proof on this score dooms the knowing use of false testimony claims. Accordingly, the above listed claims will be dismissed.

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[16] From December 3, 1990 until April 2, 1996, John Matthews a/k/a "Light" was detained, under the name of Rufus Alvarez, in Mercer County, New Jersey on a variety of drug related charges including conspiracy to distribute cocaine and maintaining a controlled dangerous substance production facility.

3. Counsel Were Deficient For Failing To Request An Investigator And For Failing To Conduct An Adequate Investigation

Johnson Claim IV.A.1

Tipton Claim V.F.I.e

Roane IV.B.1

Tipton sought and was granted the appointment of an investigator to assist in the Richmond aspects of the case. However, Tipton now contends, along with Johnson and Roane, that counsel should have requested investigative assistance with respect to the New York and New Jersey aspects of the case. The Defendants suggest that had counsel investigated this aspect of the conspiracy they would have discovered evidence to impeach the Government's witnesses. For example, the Defendants note that several of the reputed New York Boyz dispute their membership in an "organized" gang that distributed drugs or engaged in planned retaliatory violence.

The Defendants' assertion that they were prejudiced by the failure to introduce the evidence discovered by habeas counsel disregards the negative repercussions of introducing such evidence and overstates their impeachment value to the case as a whole. First, the suggestion that the Defendants were prejudiced by counsel's failure to locate and call as witnesses, New York Boyz, Lamont Sabb ("L.A."), Larry Williams ("Law"), Darryl Williams ("Smooth"), Jorge Delao ("Hess or James Wilkerson") and John H. Matthews ("Light") ignores the fact that the *Strickland* prejudice inquiry also accounts for the damaging evidence that could be elicited from each such individual upon cross-examination. *See Whitley* v. *Bair*, 802 F.2d 1487, 1494-97 (4th Cir. 1986) (emphasizing court must evaluate the negative aspects of any purportedly omitted mitigating evidence in evaluting prejudice). For example, although some of the above individuals denied being a

member of a formal group called the New York Boyz or being involved in group discussions of retaliation, they do not dispute the fact that they hung out with Tipton and Johnson, were involved in the sale of drugs, and pooled their money with Tipton and Johnson to purchase additional drugs. *See* Tr. 907. Nor does John Matthews a/k/a "Light" deny that, for a time, he was Tipton's regular source of crack. Tr. at 918.

Additional investigation might have yielded the record of "Light's" incarceration, a fact which might have been introduced without additional damage to the defense. However, Saunders admitted that his identification of "Light" was questionable and impeachment on that matter hardly undermines confidence in their convictions.[17] For example the proffered testimony does not negate: Anthony Howlen's testimony that Johnson and Tipton were part of the New York Boyz and sliced him with razors when he interfered with their attempts to sell drugs in New Jersey; the repeated references to the New York Boyz during the course of the Richmond based activities; Tipton's threats to invoke the assistance of his New York associates if retaliatory actions were required; the appearance of New York Boyz Lance Thomas and Hess in Richmond; and the repeated trips by Tipton and Johnson from Richmond to New York to obtain drugs. Moreover, none of the proffered testimony undermines the voluminous evidence that during 1991 and 1992, the Defendants operated a continuing criminal enterprise in Richmond which distributed drugs

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[17] On direct examination, Saunders acknowledged that his identification was based on the fact that someone "pointed out to me . . . a dude named – he said 'Light,' I think it was 'Light' I'm not sure." Tr. 1331. On cross-examination, Saunders acknowledged that, on his trips to New York, he heard a lot of names he did not connect with faces. Further, Saunders admitted that it is entirely possible, on the second trip, that Tipton obtained cocaine from someone other than "Light". Tr. 1366-69.

through a series of workers and murdered numerous individuals in order to ensure the success of that enterprise. Therefore, the Defendants have failed to demonstrate they were prejudiced by counsel's purported omissions and their claims will be dismissed.[18]

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[18] The Defendants assertions of deficiency on the part of trial counsel are equally unconvincing. None of the Defendants couple the deficient investigation claim with evidence that suggested to counsel that an independent investigation into New York/New Jersey aspects would be helpful to the defense. *See Smith* v. *Collins*, 977 F.2d 951, 960 (5th Cir. 1992) (noting a reasonable defense does not "contemplate the employment of wholly unlimited time and resources"). While Johnson's trial counsel disparages the quality of his own pretrial preparation, *see* Johnson Memo Ex. 10, the tenor of the cross-examination reflects that counsel for Tipton and Johnson, whether from information provided by the government or their clients, had detailed knowledge of the activities and events in New York and New Jersey. *See e.g.* Tr. at 935-40, 967, 975-76. Additionally, Roane's counsel had little reason for allocating resources into investigating the events in New York and New Jersey, because it was undisputed that Roane was not involved with Johnson and Tipton when they were selling drugs in New York/New Jersey. *See Strickland* v. *Washington*, 466 U.S. 668, 691 (1984). In short, the Defendants fail to demonstrate that prior to trial facts known to counsel suggested that independent investigation into the New York/New Jersey activities would be beneficial. Hence, the foregoing claim of ineffective assistance cannot succeed because the Defendants have not demonstrated that counsel were deficient.

4. Purported False Testimony By Priscilla "Pepsi" Greene[19]

a. The Government allowed Greene to testify falsely regarding her drug dealing activities

Johnson Claim V.N

Tipton V.C.3

Roane Claim I.C.3.a

The Defendants contend that the purported difference between Greene's testimony regarding her drug dealing activities at their trial and the subsequent trial of their codefendant, Lance Thomas, demonstrate that Greene lied at their trial. At the Defendants' trial, Greene testified as follows:

Q. How long were you involved with "O," "Whitey" and "J.R.," were you involved in the sale of cocaine with them?

A. I never sold cocaine.

Q. Did you help Curt Thorne when he sold cocaine?

A. Yes.

Tr. at 2546. At Lance Thomas' trial, Pepsi Greene, consistent with her prior testimony, explained that she merely helped Curt Thorne to sell drugs.

Q. Do you know how Curt Thorne supported himself?

A. Yes. Curt sold drugs for "Whitey" and "O."

Q. What kind of drugs did he sell for "Whitey" and "O"?

A. Crack, cook'-em-up.

Q. Did you help Curt in any way sell the drugs?

A. Yes.

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[19] Roane's contention that Pepsi Greene provided false testimony regarding his role in the murder of Doug Moody is addressed *infra* at Section VII.B.

Q. What did you do for him?

A. Well, people would come to the door, maybe sometimes I would pass the cocaine to them and get the money.

Thomas Tr. at 421-22. The Defendants' claim of perjury is based on Greene's initial denial at their trial that she sold cocaine. In Greene's perception she did not sell cocaine, she merely helped her boyfriend, Curt Thorne, sell cocaine. *See United States* v. *Derrick*, 163 F.3d 779, 828-29 (4th Cir. 1998) (emphasizing that an allegation of perjury as to a matter of perception fails absent conclusive proof that the witness testified falsely as to her belief, rather than that she was merely mistaken in her subjective assessment of the facts). Whatever the distinction in these activities, the claim lacks merit because the prosecution made sure the jury was not misled as to Greene's drug dealing activities. *See United States* v. *Vaziri*, 164 F.3d 556, 564 (10th Cir. 1999). Because the prosecution corrected Greene's misleading statements that she was not involved in selling drugs, and Greene did not otherwise testify falsely, the Defendants' claim of prosecutorial misconduct pertaining to this portion of Greene's testimony lacks merit and will be dismissed.

b. The prosecution permitted Greene to testify falsely regarding the primacy of Thomas' role in the enterprise/ the Government engaged in misconduct by presenting two different version's of Tipton's role in the conspiracy at Lance Thomas' trial

Johnson Claim V.O

Tipton Claim V.C.3,V.D.3, V.D.4, V.E.16

Roane Claim I.c.3.b

At their trial, Greene testified that Tipton, Johnson, and Roane were "partners." Tr. at 2547. Additionally, in

response to the question if she knew from whom Sandra Reavis received drugs, Greene stated, "'O. Because 'O' was the head man." Tr. at 2552. Greene was not questioned regarding Thomas' role in the drug enterprise.

At Thomas' trial, Priscilla Greene testified that, around November of 1991, through Curt Thorne's drug selling activities, she met Tipton, Johnson and Roane. Thomas Tr. at 423. About a month or two after that, Greene met Lance Thomas. Thomas Tr. at 424. Greene then explained that Thorne, "Papoose" Davis and others were merely sellers, while "[t]hey was like the head people." Thomas Tr. at 424. The prosecutor then asked Greene to explain who she meant by they.

Q. Who were the head people?

A. "Whitey," "O" - Whitney," "O," "J.R.," "V" because "V" mostly, after he came down he mostly controlled the drugs."

Thomas Tr. at 424-25. She then explained that Thomas "controlled the drugs because he had it bagged up and gave it out to people to sell." Thomas Tr. at 425. Contrary to the Defendants' current suggestion, Greene did not contradict her prior testimony that the Defendants were "partners" nor did she contend that Thomas took over leadership of the organization and managed Tipton, Johnson and Roane. Rather, Greene's later testimony, merely reflects that in January and February of 1992, within the partnership, Thomas was primarily tasked with the duty of distributing the drugs to the workers. Assumption of this task by Thomas, left the other Defendants more time to pursue the other increasing needs of the enterprise such as obtaining cocaine, collecting drug debts, eliminating the competition, and killing suspected snitches.[20] Accordingly, the above listed claims will be dismissed because the Defendants have

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[20] Nor is there any plausible suggestion that Greene's testimony at Thomas' trial is somehow exculpatory.

not demonstrated that the prosecution presented misleading, much less false testimony from Greene.

In his index of claims, Tipton alleged that Greene's purportedly false statements discussed above demonstrated that the Government had violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). *See* Tipton Claims V.D.3, V.D.4. The three components to a *Brady* claim are (1) the evidence at issue must be favorable to the defendant, whether directly exculpatory or of impeachment value; (2) it must have been suppressed by the government, whether willfully or inadvertently; and (3) it must be material. *See Spicer* v. *Roxbury Correctional Institute*, 194 F.3d 547, 555 (4th Cir. 1999). "Suppressed evidence is 'information which had been known to the prosecution but unknown to the defense.'" *Id.* at 556 (quoting *United States* v. *Agurs*, 427 U.S. 97, 103 (1976)). Tipton fails to demonstrate that this evidence meets any of the above elements. The respective roles of Greene and Thomas in distributing drugs was common knowledge to the members of the drug conspiracy. Tr. at 1690, 2708; *Fullwood* v. *Lee*, 290 F.3d 663, 686 (4th Cir. 2002), *cert. denied*, No. 02-7101, 2003 WL 99455 (U.S. Jan 13, 2003). Moreover, Greene's statements from the Thomas' trial do not diminish Greene's credibility or Tipton's guilt and do not create any possibility of a different result at either the guilt or sentencing phases. Accordingly, Claims V.D.3 and V.D.4 will be dismissed.

VI. ACTUAL INNOCENCE

Tipton Claim V.I

Johnson Claim III

Roane VIII

"Claims of actual innocence, whether presented as freestanding ones, *see Herrera* v. *Collins*, 506 U.S. 390, 417, (1993), or merely as gateways to excuse a procedural default, *see Schlup* v. *Delo*, 513 U.S. 298, 317 (1995), should not be granted casually." *Wilson* v. *Greene*, 155 F.3d 396,

404 (4th Cir. 1998). In *Schlup*, the Supreme Court held that the proper test for whether a habeas petitioner has established that his case is "extraordinary" enough to fall into that "narrow class of cases," which "implicat[e] a fundamental miscarriage of justice," is whether that petitioner has shown that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schulp*, 513 U.S. at 327. Thus, in order to have his procedurally defaulted claims reviewed in these proceedings, the Defendants must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.*; *see also O'Dell* v. *Netherland*, 95 F.3d 1214, 1249-50 (4th Cir. 1996).

This exacting standard requires the petitioner to bring to the federal habeas court probative, reliable, new evidence which establishes the claim of innocence. *See Weeks* v. *Bowersox*, 119 F.3d 1342, 1352 (8th Cir. 1997) (en banc). And, as explained by the Supreme Court:

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Schlup, 513 U.S. at 324. And, of course, the new evidence "not presented at trial" must also have been evidence that was excluded or not available at the time of trial. *Id.* at 327-28. The habeas court then must evaluate "petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Schlup*, 513 U.S. at 328 (quoting Friendly,

Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)).

The Defendants assert that they are actually innocent of being an organizer of a continuing criminal enterprise violation. Their new reliable evidence of innocence consists of the same frail evidence they offer to prove their claims that Government witnesses perjured themselves. The Defendants' new evidence and the host of arguments presented in the papers does nothing to dispel the overwhelming evidence documentary and testimonial evidence that they are guilty of running a CCE and of the CCE related murders for which they stand convicted. Accordingly, with the exception of Roane's claim that he is actually innocent of the murder of Doug Moody, the Defendants' claims of actual innocence will be dismissed.

VII. THE MOODY MURDER

A. Evidence Of The Moody Murder At Trial

In early 1992, Ronita Hollman and Doug Moody were selling drugs in the Newtowne area for Peyton Maurice Johnson. Tr. at 1992-93. Tipton, Johnson, and Roane decided to take over the drug trade in Newtowne. Tr. at 1156-58, 2330. As part of this plan, Roane and Tipton approached Hollman to lure her away from her association with Peyton Johnson and to sell drugs for them. Tr. at 1962-63. Tipton told Hollman about his plans for the Newtowne area and informed her that they were willing to kill people to accomplish those plans. Tr. at 1963. Shortly, thereafter Tipton, Johnson, and Roane began to eliminate their competition in the Newtowne area.

On or about January 6, 1992, Cory Johnson and Roane left two handguns with their underling, Robert Papoose Davis. Tr. at 1894. On January 11 or January 12, 1992, Roane retrieved one of the guns from Davis. Tr. at 1895. Douglas Moody was murdered shortly after midnight on

January 13, 1992. *See* Gov't Trial Exhibit 119. Moody had been shot once and stabbed repeatedly.

Shortly after midnight on January 13, 1992, Denise Berkley testified that she was smoking crack at a building on the corner of Clay and Harrison Streets. Tr. at 1694. Berkley heard a shot followed by the breaking of a window from the back of the building. Tr. at 1696. After disposing of her drugs, Berkley went outside and saw Roane repeatedly stabbing Doug Moody while Moody pleaded for Roane to stop. Tr. at 1697-98. Roane then approached Pepsi Greene, gave her the knife and told her to get rid of it. Tr. at 1699. Later that evening, Berkley went to a house on Moore Street, where Tipton was talking excitedly about how he had tried to shoot Moody at the house on Harrison Street.

Pepsi Greene testified that she was on the corner of Clay and Harrison Street when she heard two or three shots. Tr. at 2549. Pepsi then saw Roane and Tipton exit the house from where the shots were fired. Tr. at 2549. After five or ten minutes, Pepsi, accompanied by Roane, went to Curt Thorne's house, where Roane directed Pepsi to get him the big knife he stored there. Tr. at 2550-51, 2572-3. Later that night, Roane returned the knife, now covered with blood, to Pepsi and told her to dispose of it. Tr. at 2551-52.

Papoose Davis also testified that, on January 13, 1992, following the Moody murder, he heard Tipton and Roane conversing as follows, "Yeah, I got him, I got him . . . we can't stay out here this is hot anyway." Tr. at 1896. Davis lived within a block or two of the Moody murder. Tr. at 2560.

The next day, January 14, 1992, Berkley was present while Tipton, Johnson and Roane loaded firearms in a house on Norton Street. Tr. at 1705-6. Later that evening, Roane and Johnson retrieved the guns. Tr. at 1707-08. Roane

asked Berkley if she had seen Peyton Maurice Johnson. Tr. at 1708-09. Berkley told him she had just seen him go around the corner. Tr. at 1709. Roane then located Peyton Maurice Johnson in a tavern. Within minutes of Roane departing the tavern, Cory Johnson entered the tavern and fatally shot Peyton Maurice Johnson with an automatic weapon.

B. Purported Perjury By Pepsi Greene

Roane Claim I.c.3.c

Roane contends that Greene's testimony from Lance Thomas' trial demonstrates that she lied at his trial regarding the events of the Moody murder. However, Roane does not direct the Court to any testimony from the Thomas trial that contradicts her earlier testimony. Rather, Roane directs the Court to testimony from Thomas' trial where Greene admits, 15 minutes prior to the shooting of Doug Moody, she was in Curt Thorne's apartment, with Curt. Roane and Doug Moody arrived and "they excused me out of the house." Thomas Tr. at 426. After the shots were fired, Curt ran out of the house followed by Roane. Thomas Tr. at 426. Roane fails to demonstrate how Greene's subsequent testimony contradicted her testimony at his trial; why Greene was on the corner at the time of the shooting was not explored at Roane's trial.[21] Accordingly, Roane's Claim I.c.3.c will be dismissed because he has failed to demonstrate that Greene testified falsely.

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[21] Roane suggests that Greene concealed this information at his trial because she wished to prevent the exposure of Thorne's possible role in the murder of Moody. That suggestion is belied by the record; Greene acknowledged that Thorne was present at the site of Moody's murder in her statement to the police and implicitly in her testimony at trial. *See* Tr. at 2570-80; Clerk's Record #778 Ex. A & B.

C. Actual Innocence And Ineffective Assistance Of Counsel In Conjunction With The Moody Murder

Roane Claim IV.B.2

Roane contends that his counsel failed to conduct an adequate investigation and defense into the murder of Doug Moody. For ease of analysis, this claim is best divided into three subparts: (a) counsel's failure to adduce available testimonial and documentary evidence to support an alibi; (b) counsel's failure to discover the testimony of an eyewitness who swears that Tipton and Johnson, not Roane, murdered Moody; and (c) general critiques of the quality of counsel's cross-examination and argument. While the trial record largely belies Roane's general critiques of counsel's performance, Roane has tendered evidence which offers substantial support to the first two aspects of this claim and his assertion that he is actually innocent of the murder of Doug Moody.

1. Counsel's Performance At Trial

At trial, David Baugh, one of Roane's attorneys, effectively cross-examined both Berkley and Greene, developing the inconsistencies between their accounts and the accounts of other witnesses. Furthermore, Baugh called Gina Taylor, a neighbor who had attempted to aid the wounded Moody. Taylor testified that she had seen the individual jabbing the prostrate Moody. Taylor testified that the assailant was only about five feet six inches tall and was definitely not Roane. Baugh followed up this description by presenting evidence that two hours before the murder, a person named Keith had come to Moody's mother's house looking for him, and that a week prior, Keith's friends, armed with machine guns, had kicked in the door of Moody's mother's residence while attempting to find Moody. Baugh then called Detective Dalton who stated the foregoing information initially had led the police to suspect Keith Barley, a small featured black juvenile male, as

Moody's murderer. Roane's complaints about the quality of Baugh's courtroom performance, with exception of the lack of an objection to Pepsi Greene's statement regarding the motivations for the Moody murder, fail to point up any significant deficiency on the part of counsel.

Pepsi Greene stated Peyton Maurice Johnson and Doug Moody were killed because "O and Whitey and them didn't want Maurice and 'Little Doug' to work that area." Tr. at 2553. Assuming that counsel was deficient for failing to object to this statement on the ground that there was no foundation, Roane fails to demonstrate that an objection might have resulted in the exclusion of Greene's statement, much less altered the outcome of the proceedings. Although Rule 602 provides that a witness' testimony must be based on personal knowledge, it "does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible . . . only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to." *M.B.A.F.B. Federal Credit Union* v. *Cumis Insurance Society, Inc.*, 681 F.2d 930, 932 (4th Cir. 1982). Roane fails to direct the Court to any evidence that suggests Greene's challenged statement was based on speculation rather than the conversations of her coconspirators. Moreover, even if Roane could have excluded Greene's statement he cannot demonstrate prejudice. As recited above, there was ample circumstantial evidence, from numerous witnesses which demonstrated that the Doug Moody murder and the Peyton Johnson murder (that occurred the following day) were part of the Defendants' plan to eliminate competition in the Newtowne area. Accordingly, Roane was not prejudiced by counsel's failure to object to the foregoing statement.

2. Failure To Present Alibi Evidence

Roane contends that his counsel was deficient for failing to present evidence that he was at a hotel on the night of

Doug Moody's murder. An attorney's failure to present available exculpatory evidence is ordinarily deficient, "unless some cogent tactical or other consideration justified it." *Washington* v. *Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991). In his affidavit, Baugh acknowledges that,

> [p]rior to trial, James Roane told me that at the time Douglas Moody was murdered he was at a Richmond motel. I attempted to obtain records from the motel confirming that fact, but was unsuccessful. Mr. Roane identified a witness to that fact, whom I interviewed. She confirmed Mr. Roane's account but stated that she did not want to testify. I do not recall why I did not subpoena her or call her as a witness.

Roane Opening Memo. Ex. H at ¶3. Neither Baugh nor the record suggests any tactical reasons for not calling this unnamed woman who would have provided Roane with an alibi for the Moody murder. Additionally, Roane has produced hotel records from the Howard Johnson hotel at 3207 North Boulevard that support his claim that he was at a hotel at the time of the Moody murder. *See* Roane Reply Memo Ex. A. The records reflect that on January 2, 1992 and January 12, 1992, a Mr. Chiles[22], rented a room and then checked out the following day. *Id.* The records are accompanied by a letter from the present management indicating they were readily available in 1992. *Id.*

Giving Roane the benefit of all favorable inferences, the record before the Court indicates that Roane's counsel performed deficiently when he failed to produce available testimonial and documentary evidence of an alibi. *See Bruce* v. *United States*, 256 F.3d 592, 599-600 (7th Cir.

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[22] One of Roane's minions, who acted as a driver, was named Linwood Chiles. The registration card for January 2, 1992 is under the name of Linwood Chiles. The registration card and receipt for January 12, 1992, is under the name Larry Chiles. Both registration cards contain the same address for Mr. Chiles.

2001); *Griffin* v. *Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992). The Government fails to direct the Court to evidence to counter the suggestion that the failure to produce this evidence was attributable to bad judgment and an inadequate investigation. Furthermore, it is difficult to discount the effect of this alibi evidence in light of the disputed direct eyewitness testimony regarding the description of the individual who stabbed Moody to death. A plausible alibi might sufficiently bolster Gina Taylor's testimony that Roane was not the attacker to create a reasonable probability of a different result. *See Bruce*, 256 F.3d at 599-600 (remanding for evidentiary hearing to determine whether defendant prejudiced by counsel's failure to call alibi witness); *Griffin*, 970 F.2d at 1358. Accordingly, the Government's motion for summary judgment on Roane's claim that counsel was deficient in his investigation of the Moody murder will be denied.

3. Demetris Rowe

Roane contends that the inadequacy of counsel's pretrial investigation is further evidenced by counsel's failure to locate and call as a witness Demetris Rowe. Roane has tendered an affidavit from Rowe, who swears that she witnessed the Moody murder from across the street on a porch. Specifically, Rowe avers that,

> At the time of the killing, I had been on the porch for several hours. Earlier, I had seen "Whitey" and "O" enter an apartment at the back of [the] house. A couple of hours later, I saw Doug Moody enter the same apartment. A few minutes later, I heard noises of a fight from the apartment, and saw Doug Moody come out of the apartment. Moody was bloody, and staggering. He was followed closely by "Whitey" and "O." Moody went into the yard, and then, the alley, where "Whitey" and "O" attacked him. A woman came out of the house next door and tried to help Moody.

> I did not see James Roane, Sandra Reavis, Pepsi Greene or Denise Berkley at the scene of Douglas Moody's murder.

Roane Third Amend. Memo. Ex. A, Clerk Record #849.

The United States has not specifically addressed counsels' failure to discover Rowe's testimony in its motion for summary judgment. Hence, this Court may only summarily dispose of this claim without an evidentiary hearing only if, "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *Raines* v. *United States*, 423 F.2d 526, 531 (4th Cir. 1970). In this regard, Roane persuasively argues that Rowe's proffered testimony creates a reasonable probability of a different result. Similarly, the record does not conclusively refute Roane's suggestion that the failure to discover Rowe's testimony is attributable to an unreasonable failure[23] by counsel to canvass the vicinity of the Moody murder to locate eyewitnesses to the crime who could exculpate his client.

Roane further contends that Rowe's testimony demonstrates that he is actually innocent of the Moody murder. In order for Roane to have his defaulted claims excused, based on his assertion of actual innocence, Roane must eventually persuade the Court that "it is more likely than not that no reasonable juror would have convicted him" had Rowe testified in accordance with her affidavit. *See O'Dell* v. *Netherland*, 95 F.3d 1214, 1249-50 (4th Cir. 1996). However, to survive summary judgment, Roane is required merely to produce evidence, which if credited,

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[23] The information known to counsel justified such an investigation. Specifically, prior to trial, counsel had the testimony of an apparently disinterested eyewitness, Gina Taylor, who insisted that Roane did not commit the murder. Second, counsel had the detailed account of the alibi from his client. Third, counsel's initial investigation, corroborated the details of the account provided by Roane.

creates a material question of fact as to whether no reasonable juror would have convicted him. Certainly Rowe's belated testimony can be viewed with some scepticism and is not entirely supportive of the evidence of his innocence offered at trial.[24] *Schulp*, 513 U.S. at 332 (noting the court may consider "the timing of the submission and the likely credibility of the affiants" in assessing probable reliability of new evidence). However, Roane's conviction turns primarily on a credibility contest between the testimony of Pepsi Greene and Denise Berkley and Gina Taylor. And, in this setting Pepsi Greene's credibility is bolstered by the statement she gave to the police prior to sustaining brain damage. *See Schulp*, 513 U.S. at 328 (actual innocence review includes evidence tenably claimed to have been wrongly excluded). Nevertheless, in light of the ample, but limited, evidence marshaled against Roane, Rowe's testimony, if credited, constitutes the sort of concrete eyewitness testimony deserving of a hearing. *See Armine* v. *Bowersox*, 128 F.3d 1222, 1227-28 (8th Cir. 1997). Accordingly, the foregoing claims will be dismissed in part. Roane is entitled to an evidentiary hearing on his assertions that he is actually innocent of the Moody murder and that he was denied effective assistance of counsel in defense of that crime.

VIII. THE TALLEY MURDER

At approximately 8:00 a.m., on January 5, 1992, the police found Doug Talley stabbed to death in his car, on the southside of Richmond. On the floor in the rear of the car, the police found an army field jacket belonging to Johnny Lee Byrd. In the jacket, the police found Byrd's glasses, some pills and a dull, rusty, six inch long knife (hereinafter

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[24] Rowe's proffered testimony is inconsistent with defense witness Gina Taylor's testimony that she saw a single small individual, who she did not recognize, stabbing Moody. Gina Taylor had had a romantic relationship Tipton.

the "Byrd knife"). The police tested the knife and although the presence of blood was detected, tests to determine the species of origin were inconclusive. Clerk's Record #778, Ex C. Additionally, police were unable to recover any "latent prints of value for identification purposes" from the Byrd knife. *Id.*

At trial, Johnny Lee Byrd testified he had been selling drugs with Talley for a few days, when on January 3, 1992, Tipton asked to borrow his field jacket. Later that day, Byrd and Talley went to Papoose Davis, on four or five occasions, to obtain drugs to sell. Thereafter, Byrd smoked some of the drugs he obtained and spent the money he had earned from selling the drugs so that he was unable to repay Davis or the Defendants.

On January 4, 1992, Talley accompanied by Tipton, Roane and Johnson came looking for Byrd. Byrd was hiding because he was unable to repay the Defendants for the drugs that had been provided to him. When the Defendants could not find Byrd at his residence, Roane punched Talley in the eye.[25] Then, Tipton, Roane, Johnson, and Talley drove off.

Hussone Jones testified that on January 4, 1992, Tipton told Jones to get in his car and follow Tipton and Roane who were going to ride with Doug Talley. Between 3 a.m. and 5 a.m. on January 5, 1992, Talley stopped on a corner on the southside of Richmond. Jones pulled in behind Talley's car, within a "car or two lengths." Tr. at 1571. Roane and Tipton got out of Talley's car and then got back in. Roane sat behind Talley and Tipton sat in the passenger seat. Roane grabbed Talley around the neck and Tipton started stabbing Talley in the body. "After awhile," Roane released Talley and got in the car with Jones.

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[25] A bruise over Talley's eye is clearly visible in the autopsy pictures. Gov't Ex. 4-3.

At Roane's direction, Jones pulled up beside Talley's car. By this point, Tipton had gotten out of Talley's car and continued to stab Talley, who "was hanging out of the car." Tr. at 1575. Tipton's final stab stuck in Talley's head, and Tipton had to push his foot against the door to get the knife out. Tipton kicked the car door in an attempt to shut Talley's body in the car, but the door would not shut. Tipton, Roane and Jones, left the scene with Talley's body still hanging out of the door.

Tipton told Jones to take them to "Wildman's" house. After dropping off Roane, Tipton and Jones arrived at Wildman Stevens' house. Jones testified that Tipton gave Stevens the knife to wash off while he took a shower.

Tipton and Roane allege that the prosecution knew or should have known that Jones' description of the Talley murder and the events immediately following it were false. Additionally, Titpon contends that his counsel provided ineffective assistance in defending Tipton on the Talley murder.

A. Purportedly False Description of the Stabbing

Tipton Claim V.C.2,

Roane Claim I.c.4

Tipton and Roane assert the description of the stabbing was false because "the crime scene video and the location where Talley's car and body were discovered would have revealed that the position of the streetlights did not allow a clear view of the events. The most [Jones] could have seen were shadows and silhouettes." Tipton Opening Memo at 70. The record reflects that Jones was within ten to twenty feet of the stabbing. Although the crime scene video does not reveal any streetlights within fifty feet of where Talley's car and body were found, it offers persuasive evidence that Jones would have been able to clearly witness the stabbing. In the video, filmed about four hours after the murder, the interior car light is on (Talley's head and arm prevented the

door from closing). *See* Gov't Trial Ex. 119. Thus, Jones would have had an illuminated view of the stabbing, after Roane exited Talley's car and subsequently when Talley or Tipton opened the driver's door.

Next, the Defendants cite Dr. Fierro's testimony for the proposition that Talley was either stabbed from behind by a right-handed assailant or stabbed from the front by a left-handed assailant. Asserting that he is right-handed, Tipton argues that Jones' account of the stabbing must have been false and the prosecutor must have known of its falsity. Contrary to the Defendants' suggestion, Dr. Fierro's testimony does not contradict, Hussone Jones' description of the mode of attack employed by Talley's murderer.

> Q. You keep pointing to the right side of your neck. Were the majority of his injuries received from the right side of his body?
>
> A. Yes.
>
> Q. Would that indicate to you that his attacker was to his right, to his left, behind, or in front of him?
>
> A. It either means that someone is behind him stabbing this way, or in front of him stabbing this way. (Witness indicating.)

Tr. at 2066. Dr. Fierro's testimony did not suggest that Tipton, who was initially sitting on the right of Talley, could not stab Talley on the right side of his body. Additionally, although Talley had 47 stab wounds to his right scalp and neck, the remainder of the wounds were distributed across his body and head.[26] Such a diffusion of wounds is consistent with Jones' description that, by the end of the stabbing, Talley had struggled partly out of the car and Tipton had left the car and continued to stab Talley from

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[26] Talley had 11 stabs wounds on the front of his chest and neck, 14 stab wounds to his face, 9 to his right upper back, and 3 stabs to his right wrist.

outside the vehicle. And, Jones' description of a stab wound penetrating the skull was confirmed by the autopsy.

In addition to the autopsy, the minutiae of Jones' account were corroborated by the crime scene and the testimony of Charles Townes. Just as Jones described, Talley's car was parked near a corner, Talley was left hanging out of the door, and the car door bore a dent from where Tipton had attempted to kick the door shut. Furthermore, the police recovered Tipton's blood-smeared finger print from the door of Talley's car. Finally, Jones' account of the stabbing was confirmed by Charles Townes. Tipton told Townes that Jones was present while Tipton stabbed Doug Talley in the head, in Talley's car, on the southside of Richmond. The record conclusively refutes Tipton and Roane's assertions that Jones testified falsely regarding his viewing of the Talley murder or that the prosecution knew Jones testified falsely in that regard.

Next, Roane and Tipton allege that the prosecution knew that Jones testified falsely about Tipton giving the murder weapon to Wildman Stevens' to wash. The only admissible evidence they offer to support this is a vague affidavit wherein Stevens swears that "Richard never gave me a knife to wash. I have never seen Richard with a knife. I recalled Mr. Toby Vick asking a lot of questions." Tipton Reply Memo App. at 8. The United States has responded by submitting the affidavit of Toby Vick and contemporaneous notes of his interview with Stevens. Vick swears that "[t]here was no information other than that contained within my written notes that was given to me by Mr. Stevens which was germane to the issue. There was nothing of an exculpatory nature contained in Mr. Stevens' statement to me." Govt's Resp. Ex. B.[27] Vick's notes do not

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[27] It is unclear when Vick interviewed Stevens. Jones initially failed to reveal his role in the Talley murder to the prosecution or the grand jury. Tr. at 1596-97, 1615, 1646. Until Jones revealed his

indicate Stevens was questioned or provided any information about a knife or the Talley murder. The record does not demonstrate any knowing use of false testimony by the United States. Moreover, in light of the overwhelming evidence that corroborated Jones' account of the Talley murder, there is no "reasonable likelihood" any testimony about events at Wildman's house "could have affected the judgment of the jury," with regard to the conviction of Roane and Tipton for the Talley murder. *See United States* v. *Bagley*, 473 U.S. 667, 679 (1985). Tipton's Claim V.C.3 and Roane's Claim I.c.4 will be dismissed.

B. The Prosecution Suppressed "Wildman" Stevens' Statement Regarding The Events At His Home Following The Talley Murder

Tipton Claim V.D.1

Roane Claim I.b.

Roane and Tipton assert that the same facts which demonstrate that the prosecution knew Jones lied about the events at Stevens' house constitute a *Brady* violation. Specifically, Vick was obliged to inform the defense that Stevens had denied receiving a knife from Tipton. However, as described above, there is no evidence that Stevens actually conveyed such information to Vick. Accordingly the above listed claims will be dismissed because the prosecution had no exculpatory information from Stevens.

C. Counsel Failed To Adequately Defend Tipton On The Charge That He Murdered Talley

Tipton Claims V.F.1.h

In support of this claim, Tipton asserts that counsel (1) should have called Victoria Harris as an alibi witness, (2) should have called Wildman Stevens as a witness to refute

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role in the Talley murder, the record does not suggest the prosecution would have a reason to question Stevens about the night of the Talley murder.

Jones' testimony, (3) should have pointed out that it was too dark for Jones to have observed the stabbing, (4) should have performed independent testing on the knife found in Johnny Lee Byrd's jacket to determine whether it was the murder weapon, and (5) should have requested the appointment of a fingerprint expert.

Conspicuously absent from these criticisms is any evidence from Tipton that he told his counsel that the foregoing avenues of investigation would have been fruitful. *See Lackey* v. *Johnson*, 116 F.3d 439, 152 (5th Cir. 1997) (counsel is not ineffective for failing to discover evidence about which the defendant knows but withholds from counsel). For example, there is no evidence that Tipton told counsel that Victoria Harris could provide him with an alibi[28] or that Wildman Stevens would contradict Hussone Jones' description of the events following the Talley murder. Nevertheless, Tipton maintains that counsel's duty to conduct a reasonable investigation required him to seek out and interview Stevens. This is not true. Counsel had no reason to believe that it would be fruitful to interview Stevens when the Government's evidence indicated that Stevens was simply another CCE minion. Tipton has not shown counsel was deficient for failing to interview or call Stevens and Harris as witnesses. Additionally, because Talley's car was illuminated by the interior car light, counsel wisely eschewed contending that Jones' description of the stabbing was a fabrication.

Similarly, counsel had little reason to believe the independent forensic analysis urged here by Tipton would aid Tipton's defense to the Talley murder.[29] For example,

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[28] Tipton has failed to produce an affidavit or any other evidence to support his claim that Victoria Harris could provide an alibi. *See* Fed. R. Civ. P. 56(e).

[29] At trial, defense counsel suggested through cross-examination and argument that the knife found in the pocket of Byrd's jacket was the murder weapon. Counsel then called Detective Cox who testified

Tipton contends counsel should have conducted an independent forensic and fingerprint analysis of the Byrd knife and the blood on that knife. Counsel's decision to forego independent forensic testing was entirely reasonable in light of his knowledge that pretrial testing was unable to ascertain the species of the blood on the knife and indicated that "no latent prints of value for identification purposes are present." Clerk's Record #778, Ex C; *see Jones* v. *Murray*, 947 F.2d 1106, 1112 (4th Cir. 1991) (concluding counsel reasonably relied on state experts in foregoing an investigation of mental health defenses).[30] Nevertheless, Tipton argues that even if the latent fingerprints were not sufficient to provide a positive match they might have been sufficient to eliminate him as the subject who left the fingerprints. Counsel reasonably eschewed this investigation—no one suggested that Tipton had used the Byrd knife to murder Talley.[31] Thus, instead of wasting time and

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that they had questioned Byrd in conjunction with the Talley murder and that Byrd had provided inconsistent statements regarding the identity of the person to whom he had supposedly lent his jacket. And in closing argument, counsel for Roane and Tipton called to the jury's attention the similarity in the width of the knife recovered from Byrd's jacket and the stab wounds described by Dr. Fierro.

[30] Counsel had no reason to suspect the state employees who conducted the tests were incompetent or biased in the performance of their duties. The record indicates the testing was performed at a time when the police were still questioning Byrd as a suspect with regard to the Talley murder.

[31] Nor can Tipton demonstrate any prejudice flowing from the lack of an independent forensic examination of the Byrd knife. On May 3, 2000, the Court granted Tipton's request to have the knife examined by his expert. Thereafter, the Court forwarded the knife and other materials pertaining to the murder of Talley to Tipton's forensic expert, Herbert MacDonnell. MacDonnell's examination of the knife did not produce any new exculpatory information nor did it identify the species of the blood on the knife. *See* Clerk's Record #822, Ex. 1. Instead, without explaining what tests he conducted, MacDonnell speculates that, perhaps, DNA testing might reveal the nature of the blood found on the knife blade.

resources on an investigation that was unlikely to provide exculpatory information,[32] counsel chose to exploit the Government's failure to conduct the additional testing to undermine its proofs with respect to the Talley murder. *See Smith* v. *Stewart*, 140 F.3d 1263, 1273 (9th Cir. 1998) (in rejecting ineffective assistance claim, court notes that counsel "was happier to have [missing witness] as an empty chair to which he could point, without facing the danger of refutation"). Thus, in his closing argument, counsel employed these omissions to great effect noting the prosecution's failure to tell the jury about the Byrd knife even though it was "obvious[]" from Dr. Fierro's testimony that the knife could have been the murder weapon. Tr. at 3041-42. Counsel then suggested that the prosecution had not performed any tests to determine if the Byrd knife was the murder weapon because such tests might be inconsistent with the prosecution's "Get Whitey" theory. Counsel made a similar inference about the failure of the police to determine whether the substance from which Tipton's fingerprint was lifted was in fact blood.

Undeterred, Tipton contends that counsel should have retained an expert to testify that Tipton's fingerprint recovered from the window of Talley's car could have been made prior to the Talley murder. Counsel was able to elicit testimony on this point from the prosecution's expert who admitted that he could not tell if the fingerprint recovered from Talley's car had been made in December or January. Such a brief jab at the prosecution's evidence was a sounder

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[32] Counsel had good reason to believe that additional expert testimony would constrict the range of available defenses. Specifically, while counsel freely suggested to the jury that Byrd murdered Talley, counsel knew that Byrd had passed a lie detector test with regards to that murder. Tr. at 5. Additionally, the dull rusty knife recovered from Byrd's jacket is not entirely consistent with the "sharp blade" that had been used to kill Talley. Tr. at 2069 (Dr. Fierro).

tact than prolonged expert testimony on the theoretical life span of fingerprints on glass or disputing the prosecution's assertion that the print found was superimposed in blood in light of the crime scene photos. Those photos reflect that Tipton's latent print was found superimposed in a reddish brown substance that looks identical to the blood that was smeared all over the crime scene. *See* Gov't Ex. 1-1 through 1-7. Tipton has not demonstrated that counsel was deficient in his investigation and presentation of a defense to the Talley murder. For these same reasons, Tipton's request to conduct additional discovery and testing regarding Byrd's jacket and/or Byrd's other personal items obtained from the Talley car will be denied. *See* Clerk's Record 822. Moreover, in light of Tipton's bloody fingerprint at the crime scene, Jones' well-corroborated eyewitness account of the murder, and Tipton's confession of the murder to Charles Townes, Tipton has failed to demonstrate a reasonable probability that any further investigation by counsel would have altered the jury's findings. The above described claims will be dismissed.

D. Counsel Was Deficient For Failing To Object To Incorrect Instructions Regarding The Enterprise Element Of the RICO Charges

Tipton Claim V.F.1.g.2

Title 18 U.S.C. § 1959 penalizes certain violent crimes, such as the Talley murder, when they are committed for the purposes of gaining entrance to or maintaining or increasing one's position in "an enterprise engaged in racketeering activity." In order to secure a conviction under § 1959, "the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'" *United States* v. *Turkette*, 452 U.S. 576, 583 (1981) (explaining the distinction between the two elements). When instructing the jury on the elements of a § 1959 offense, the Court twice misspoke, referring to racketeering activity when it should have said "an

enterprise engaged in racketeering activity". Tr. at 3220. However, the instructions as a whole told the jury that it must find both the existence of an enterprise engaged in racketeering activity and the criminal acts that constitute the racketeering activity, *see United States* v. *Tipton*, 90 F.3d 861, 888 (4th Cir. 1996). Moreover, in light of the abundance of evidence demonstrating that the racketeering enterprise existed, Tipton has not explained, much less demonstrated, a reasonable probability that more accurate instructions would have resulted in his acquittal on the RICO counts. Accordingly, the above claim will be dismissed.

IX. THE STONEY RUN MURDERS (Curt Thorne and Linwood Chiles)

A. Evidence At Trial

On February 19, 1992, at approximately 10:15 p.m., Curt Thorne, Linwood Chiles, Gwen Greene and Pepsi Greene were shot in Chiles' station wagon, on Stoney Run Road.[33] Pepsi Greene testified that she, Gwen, Thorne, Chiles and Johnson were driving when they pulled in "something like an alley." Tr. at 2558. A gray car pulled in behind them. Johnson told Chiles to place his head on the steering wheel, then Johnson put a gun to Chiles' head and shot him.

Gwen Greene testified that, immediately prior to being shot, Tipton called to her from outside the vehicle, she then saw Tipton wearing blue jeans and a brown jacket with a hood.[34] This description of Johnson's accomplice to the

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[33] Officer Cynthia Riley testified that she received a call to respond to the shooting at 10:36 p.m. Tr. at 2519. Walter Tuck testified that he saw a lady lying in the road with blood around her head and the radio announced the time as 10:17 p.m. Tr. at 2529-31.

[34] Tipton asserts that only a single gun, that was later recovered from Johnson, was used in the Stoney Run murders. Although the portions of the record cited by Tipton attribute some of the recovered bullets to a Glock later retrieved from Johnson, the ballistic evidence does not demonstrate whether all the bullet

Stoney Run murder was confirmed by Walter Tuck, a passing motorist, who observed a medium complexioned black male, wearing a brown jacket, walking away from the murder scene.

Additionally, the Government's evidence indicated that Tipton's arrival at the murder scene in the gray vehicle was part of a plan he and Johnson had coordinated to provide a getaway car. Specifically, Valerie Butler testified that at 4:00 p.m., on February 19, 1992, Johnson borrowed her gray car and then called Tipton. Johnson then appeared at Nita Bracey's house around 7:30 p.m. with Curt Thorne. At 8:00 p.m., Johnson dropped Butler off at her home and told her he needed to keep her car because he wasn't finished with it. Johnson then picked up Curt Thorne and drove to an apartment on the Southside of Richmond where they waited for Chiles and the Greene sisters to arrive. When Chiles and the Greene sisters arrived, Johnson paged Tipton, who was driving around with Charles Townes, John Knight, and Thomas "Stoodie" Green.[35] Tr. at 1188. Upon receiving the page, Tipton called Johnson back and then got in the car and said "'C.O. just got all four of them'. Studie [Stoodie] said, 'Who?' He said, 'Linwood, Curt,' and then he had cut it short." Tr. at 1189. Townes and Knight then dropped Tipton and Stoodie Green off at an apartment in the Southside of Richmond and drove home. Townes and Knight arrived home at 9:45 p.m.[36] Meanwhile, Tipton had

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fragments recovered from the crime scene came from the Glock recovered from Johnson. In contrast, the possibility of a second shooter is suggested by Thorne's autopsy which reflected that he had been hit by bullets fired from two different directions.

[35] Townes testified that Tipton was wearing blue jeans and a gray hooded sweatshirt. Except for the color of the sweatshirt, the clothing is consistent with what Gwen Greene stated Tipton was wearing on the night of the murder.

[36] Townes was very sure about the time, because Knight had to work the next day.

left the apartment and was driving to aid Johnson in eliminating Thorne, Chiles, and the Greene sisters.

B. Alleged Brady Violation

Tipton Claim V.D.2

In Claim V.D.2, Tipton contends that the Government suppressed, in violation of *Brady*, the exculpatory statements of his alibi witnesses to the Stoney Run murders. Specifically, Tipton contends that, when he was paged by Johnson, the Stoney Run murders already had occurred, hence, he went back to the car and told Knight, Stoodie Green, and Townes that Johnson had killed four people. "Knight and Green [in turn] told government agents that Tipton said that Johnson had killed four people." Tipton Reply Memo at 52. This *Brady* claim is flawed. Here, Tipton obviously knew the identities of the parties who had heard his comments following the page from Johnson and was free to question them. Such facts foreclose any *Brady* claim because, "where exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States* v. *Wilson*, 901 F.2d 378, 381 (4th Cir. 1990). "Certainly, then, information that is not merely available to the defendant but is actually known by the defendant would fall outside of the *Brady* rule." *Fullwood* v. *Lee*, 290 F.3d 663, 686 (4th Cir. 2002), *cert. denied*, No. 02-7101, 2003 WL 99455 (U.S. Jan 13, 2003). Additionally, Tipton has not tendered evidence that demonstrates that Stoodie Green provided the police with any statement containing exculpatory information regarding the Stoney Run murders. Moreover, as discussed below in connection with the related ineffective assistance claim, Green and Knight's vague proffers utterly fail to counter the direct and circumstantial evidence that Tipton was an active participant in the Stoney Run murders. Tipton's Claim V.D.2 will be dismissed.

C. Counsels' Failure To Call Knight And Green As Defense Witnesses

Tipton Claim V.F.1.i

In Claim V.F.1.i, Tipton blames his counsel, rather than the Government, for failing to adduce purportedly exculpatory evidence from Knight and Stoodie Green. Conspicuously absent from the record is any evidence from Tipton that he told counsel that Stoodie Green or Knight could exonerate him from involvement in the Stoney Run murders: "In general, counsel is not ineffective for failing to discover evidence about which the defendant knows but withholds from counsel." *Lackey* v. *Johnson*, 116 F.3d 439, 152 (5th Cir. 1997). Counsel reasonably concluded from Tipton's silence that neither Green nor Knight could provide exculpatory information. Moreover, as discussed below, Tipton has failed to demonstrate that Green or Knight could counter the compelling evidence of his involvement in the Stoney Run murders.

Tipton has submitted an affidavit wherein Stoodie Green avers that,

> I was with Richard Tipton, Charles Townes, and John Knight on February 19, 1992, the night Linwood Chiles and Curt Thorne were killed. I remember Richard received a page from someone and using the telephone. Later that evening we hear it on the news.
>
> I know Richard Tipton did not commit that crime. . . .
>
> I never heard Richard Tipton talk about killing people.

Tipton Reply Memo Ex. 10. Strikingly absent from Green's affidavit is an indication that Green could provide Tipton with an alibi for the interval between roughly 9:30 and 10:17 p.m. when the Stoney Run murders occurred. In the absence of that information from Green, Green's general denial of Tipton's guilt has little probative value. *See Evans*

v. *Technologies Applications & Service Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996). Nor does the affidavit of Alfred Brown prove that Green could offer a convincing alibi for Tipton.[37] Tipton Reply Memo Ex. 11. Brown's affidavit consists entirely of inadmissible hearsay. *See Greensboro Prof. Firefighters Ass'n* v. *Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995); *Maryland Highways Contractors Ass'n* v. *Maryland*, 933 F.2d 1246, 1251-2 (4th Cir. 1991).

Tipton fails to demonstrate that John Knight could have contributed any more to his defense than Stoodie Green. Knight avers that,

> On February 19, 1992, I was in the company of Thomas Green, Charles Townes, [and] Richard Tipton in South Richmond when Richard received a page. I stopped the car to allow him to use the telephone. He returned to my car and said four people had gotten killed.
>
> Shortly after that I drove them to Hillside court where Richard and Stoodie got out at a house.
>
> I returned to Central Gardens with Charles Townes.
>
> I was questioned by police and I gave the above statement to a detective.

Tipton Reply Memo Ex. 9. Conspicuously absent from Knight's proffered testimony is any reference to time.

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[37] In his affidavit Brown states,

> Greene told me that on the afternoon of February 19, 1992, he was riding with Richard Tipton, John Knight and Charles Townes. They were in south Richmond when Richard Tipton received a page from Cory Johnson. After using the telephone, Richard returned to the vehicle and stated "four people just got killed."
>
> He also said that he and Richard remained together, and later that night they watched the report of the murders on the news.

Tipton Reply Memo Ex. 11.

Regardless of what Tipton may have said upon his return to the vehicle, the evidence convincingly demonstrates that the murders did not occur until after Tipton received the page.

Saunders' testimony placed the page at about 9:30 p.m. Tuck, the passing motorist, indicated the murders had taken place just before 10:17 p.m. John Knight has not proffered any testimony that suggests he could have testified to Tipton's whereabouts during the interval of time between 9:30 p.m and 10:17 p.m. Furthermore, the circumstantial evidence, as recounted above, strongly supports the Government's theory that during the interval roughly from 9:30 p.m. to 10:17 p.m., Tipton had retrieved Valerie Butler's gray car and was following Chiles' station wagon, so as to provide Johnson a means to flee the crime scene. The theory that Tipton had planned the Stoney Run murders was further supported by Tipton's comments to Johnson that he "moved too fast; it was not supposed to be done there." Tr. at 1349 (Saunders' Testimony). Sterling Hardy also presented evidence that indicated the murder of Chiles was to be a joint venture planned by Johnson and Tipton. While incarcerated Sterling Hardy told Lance Thomas that he was concerned that Chiles might testify against them. Tr. 2191. Thomas responded, "not to worry about that, because what he did for Cory and Whitey, that they will take care of that for them." Tr. at 2191. Finally, Gwen Greene's compelling testimony placed Tipton at the scene of the murders. Tipton has demonstrated neither deficiency nor prejudice. Tipton's Claim V.F.1.i will be dismissed.

X. THE PROSECUTION KNOWINGLY PERMITTED JERRY GAITERS TO TESTIFY FALSELY REGARDING THE MURDERS OF LONG, ARMSTRONG, AND CARTER

Johnson Claim V.P

Tipton Claim V.C.4

Jerry Gaiters testified that he aided Johnson in murdering Dorothy Armstrong. Relying on testimony from Lance Thomas' trial, Johnson claims that Gaiters perjured himself regarding when he knew that Johnson intended to kill Armstrong. Thomas Tr. at 569. The facts surrounding this claim are as follows. At Johnson's trial, Gaiters testified that he was talking to Linwood Chiles when Johnson asked him for directions to Armstrong's brother's house, Bobby Long. Gaiters told Johnson that he would take him over there. Tipton then pulled up in a car with a young fellow and Johnson and Gaiters got in the car. They drove to 1212 West Moore Street and retrieved a bag of guns. After dropping off the young fellow, they drove to Bobby Long's house. Johnson sat in the back seat playing with a Glock pistol he had retrieved from 1212 West Moore Street. Gaiters stated that he was kind of nervous because Johnson's manner led him to believe that he might be shot in the head.

When they arrived at Bobby Long's house, Johnson told Gaiters, "I want you to get 'Mousey' to bring out the house[sic]. When I shoot the bitch in the as[s] I want you to run back to the car." Tr. at 2343-44. Gaiters went to the door and induced Bobby Long to open the door. At which point, Johnson burst into the room and killed Armstrong, Carter and Long using a Glock pistol.[38]

At Lance Thomas' trial, Gaiters testified that he initially believed that Johnson simply wanted to talk to Armstrong.

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[38] Denise Berkley testified that Johnson wanted to kill Armstrong because Armstrong had welched on a drug debt.

Thomas Tr. at 569. Counsel then asked Gaiters whether "[a]t some point on the way over there [you knew] what 'C.O.' was going to do didn't you?" Thomas Tr. at 569. To which Gaiters responded, "no." Thomas Tr. at 569. Johnson and Tipton contend that Gaiters' denial of foreknowledge of the Armstrong murder demonstrates that Gaiters lied at their trial and requires that their convictions be set aside. They are wrong.

First, at the Defendants' trial, Gaiters testified that during the car ride to Long's home there was no conversation regarding hurting or killing Armstrong. Tr. at 2367. And Gaiters stated that he only realized the purpose of the trip, "when we got over there" and "were near the house" but not beforehand. Tr. at 2415. Thus, Gaiters' testimony at Thomas' trial was consistent with his testimony at Johnson's trial, that he did not grasp that Johnson intended to shoot Armstrong until they approached Long's residence.

Second, even if the testimony could be deemed to be inconsistent, it would still fall short of demonstrating that Gaiters testified falsely, much less that the government knew that Gaiters was testifying falsely. *See United States* v. *Grilley*, 814 F.2d 967, 971 (4th Cir. 1987) ("Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony.").

Third, even if Gaiters lied regarding the exact moment he became aware of the plan to murder Armstrong, there is no possibility that exposing such a lie to the jury would have altered Tipton's and Johnson's convictions and sentences. Defense counsel fully exposed Gaiters dissembling regarding his culpability for the murder of Dorothy Armstrong. *See e.g.*, Tr. 2363-64, 2373-77, 2380-94. Exposing another misrepresentation of that ilk by Gaiters would not significantly diminish Gaiters' credibility regarding the roles Tipton and Johnson played in the

murder of Armstrong, Long, and Carter. *Cf. United States* v. *Hoyte*, 51 F.3d 1239, 1243 (4th Cir. 1995) (discussing effect of cumulative impeachment evidence). Gaiters' testimony on that score was thoroughly confirmed by Charles Townes and the ballistics evidence. Charles Townes testified that immediately prior to the murders, Tipton and Johnson told him they were going to Church Hill to murder Armstrong. Subsequent to the murders, Tipton provided Townes with an account of the murders which largely corroborated Gaiters' testimony. And, the ballistics evidence corroborated Gaiters' account of the murder. Gaiters asserted that Johnson used a Glock pistol, retrieved from 1212 West Moore Street, to kill Dorothy Armstrong. The ballistic evidence reflected that the bullets that killed Dorothy Armstrong came from a Glock that was hidden at 1212 West Moore Street. Denise Berkley swore that Johnson was the only person who knew where the Glock was hidden. Claims V.P, and V.C.3 will be dismissed.

XI. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Each Defendant received one or more sentences of death.[39] Johnson, Tipton, and Roane argue that if counsel had put forth a reasonable effort the result might have been different. The Court disagrees with the Defendants' critiques of counsel's performance and the suggestion that a

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[39] Ultimately, the jury recommended the death sentence for Johnson on all seven of the § 848(e) capital murders for which he had been convicted, those of Louis Johnson, Long, Carter, Armstrong, Thorne, Chiles, and Peyton Johnson. The jury recommended the death sentence for Tipton on three of the capital murders, those of Talley, Chiles, and Thorne, of the six for which he had been convicted. The jury recommended the death sentence for Roane on one of the capital murders, that of Moody, of the three for which he had been convicted. A full description of the aggravating and mitigating factors found as to each defendant is stated at *United States v. Tipton*, 90 F.3d 861, 894-95 (4th Cir. 1996).

different result was obtainable but for counsel errors. Counsel for each Defendant did an excellent job at sentencing. The sentences of death are not attributable to counsel's omissions, but to the absence of evidence or argument that could counter the Government's compelling case that death was the appropriate punishment for the each Defendant's brutal, remorseless behavior.

A. Purported Deficiencies By Roane's Counsel

The jury only sentenced Roane to death for his murder of Doug Moody. As a necessary predicate for that sentence, the Government was required to prove that Roane had committed the murder after substantial planning and premeditation. *See* 21 U.S.C. § 848(k)&(n)(8). Roane contends, in light of the centrality of this issue, counsel was deficient for failing to challenge the Government's proof of the issue at sentencing and for conceding in his closing arguments that the Government had proved the required aggravating factors.

1. Counsel's Failure To Challenge Substantial Planning Aggravating Factor

Roane Claim IV.E.4

Counsel's concession of this issue was reasonable in light of the ample evidence that demonstrated substantial planning and his sentencing phase strategy of focusing the jury's attention on the humanity of this client rather than the inhumanity of his actions. In rejecting his challenge to the substantial planning factor on appeal, the Fourth Circuit aptly summarized the evidence on this point as follows:

> the jury had before it information that well before Moody's murder, a motive for it, to which Roane was privy with Tipton and Cory Johnson, had developed. Specifically, trial evidence showed that Moody and his superior, Peyton Johnson, a rival drug dealer, were thought by Tipton, Cory Johnson, and Roane to be

> standing in the way of their taking over the Newtowne drug market whose development was Roane's special function. Evidence from the guilt phase revealed . . . that Tipton and Johnson "and them didn't want Maurice [Peyton Johnson] and 'Little Doug' [Moody] to work in that area . . . selling cocaine." From this and other information respecting the details of Moody's murder, the jury properly could find that the visit of Roane and Tipton to [the] apartment on the night of his murder was for the pre-planned, premeditated purpose of murdering him. It showed that they went there armed with the pistol used by Tipton in wounding Moody although members of the enterprise did not as a matter of policy ordinarily carry weapons. It showed that Moody's initial wounding and eventual killing were in the pattern of the comparable enterprise-related, cold-blooded assassinations of Talley some ten days earlier and of Moody's superior, Peyton Johnson, the night after Moody was killed . . . the issue was whether the murder, not its exact means, was the result of substantial planning and premeditation by Roane. And on that issue the jury had ample information upon which to base its finding beyond a reasonable doubt that Moody's murder was "substantially planned and premeditated" by Roane in concert with Tipton.

United States v. *Tipton*, 90 F.3d 861, 896 (4th Cir. 1996). Despite this evidence and the jury's prior conclusion that he had murdered Moody as part of their drug dealing enterprise, Roane insists counsel should have argued at sentencing that the evidence did not demonstrate that he murdered Moody as a part of a turf battle. Counsel wisely eschewed such a doomed tact.

The best hope for Roane was to emphasize the evidence in mitigation rather than challenge the prosecution's solid

case on the substantial planning aggravating factor. *See Carter* v. *Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (concluding it was reasonable for counsel to concede client's culpability in order to establish credibility with the jury); *Bell* v. *Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) (concluding counsel reasonably conceded defendant's guilt on the kidnapping charge to retain credibility during the sentencing phase). Thus, at sentencing when the prosecution emphasized that death was the appropriate sentence based on the numerous violent acts of the Defendants, counsel conceded the acts of the defendants were bad, but emphasized that during the sentencing the jury was "to determine whether or not there is something about their lives and individuality that should justify not killing them. We are not here to look at the acts again. We are here to look at the people." Tr. 3928. In light of the foregoing, counsel's failure to challenge the substantial planning aggravating factor and focus on the mitigating evidence was neither prejudicial or deficient. *See Truesdale* v. *Moore*, 142 F.3d 749, 754 (Cir. 1998); *Pruett* v. *Thompson*, 996 F.2d 1560, 1571 n. 9 (4th Cir. 1993). Claim IV.E.4 will be dismissed.

2. Purported Deficiencies In Investigating And Presenting Evidence Of Roane's Mental And Emotional Background

Roane Claim IV.E.1-2

Although counsel adduced evidence regarding Roane's severe poverty, organic brain damage, neglect and abuse, humiliation at the hands of his peers, exposure to community and family violence, learning disabilities, self-medication, and the system's failure to respond to these problems, in Claim IV.E.1, Roane vaguely complains counsel's presentation prevented the information from reaching the jury in a cogent form and omitted other critical evidence. Such charges are heavy with adjectives but light on facts and rely primarily on the affidavit of Dr. Lee

Norton, who swears that the mitigation case presented by the defense was incomplete and failed to help the jury understand the mitigation evidence presented. Norton fails to support such criticism with the purported omitted mitigating evidence or with any new insights into the relevance of Roanes' experiences and deficits.

For example, Norton criticizes the quality of the investigation into Roane's background. However, the record demonstrates that counsel and his mitigation experts reviewed thousands of pages of records and interviewed numerous witnesses in preparation for sentencing. At sentencing, Crystal Noakes, a social worker, described Roane's disturbing family background in great detail, including the fact that he had three uncles who were institutionalized, that his mother had been placed in foster care, and that his father left his mother and was convicted of robbery and murder. Despite these efforts, Roane contends that counsel was deficient for not reviewing the medical records, the school records, and the foster care records of Roane's mother; medical records and prison records of Roane's father; and the records documenting the mental illness of Roane's uncles.

The trial record reflects that counsel had uncovered the essential facts regarding these relatives. Additionally, Roane's mother refused to provide any information regarding her time in foster care and the Government has tendered evidence indicating that counsel actively pursued Roane's mother's medical and school records and his father's prison record. *See* Govt's Response at Ex. C; *see also* Tr. at 3723. With much on his plate, and his further inquiry into these areas stymied, counsel apparently concluded further investigation into the background of these relatives was not worth the time and effort. That decision appears to be entirely reasonable. "Just as counsel is not obliged to advance every available nonfrivolous argument, so counsel is not necessarily ineffective for

failing to investigate every conceivable matter inquiry into which could be classified as nonfrivolous." *Smith* v. *Collins*, 977 F.2d 951, 960 (5th Cir. 1992). Roane fails to overcome the "heavy measure of deference" that is accorded counsel's judgment not to pursue further investigations into these tangential matters. *See Strickland* v. *Washington*, 466 U.S. 668, 691 (1984). Additionally, Roane fails to demonstrate that the omitted records would have yielded any significant mitigating evidence, much less that counsel should have been aware of that fact.

Next, Roane charges that his counsel failed to elicit expert testimony that explained to the jury the relevance of his self-medication, his relationship with his codefendants, his sexual abuse and his witnessing violence in his youth. The relevant impact of all these factors was addressed at sentencing. Dr. William Lordi testified that Roane suffered from brain damage and Attention Deficit Disorder which resulted in paranoia and other personality problems.[40] Dr. Lordi explained that people with Attention Deficit Disorder, like Roane, often self-medicate with drugs or alcohol and that Roane's criminal association with Tipton and Johnson was a natural consequence of Roane's mental disorders and his desire to create the family structure he never had.

Additionally, Dr. Lordi and Crystal Noakes documented and explained the high incident of trauma Roane had experienced growing up. Dr. Lordi and Noakes testified that Roane had been sexually abused by a family friend on a continuous basis from age four to six and that Roane's early antisocial behavior of setting fires was the result of such abuse. Noakes testified that Roane was traumatized by the

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[40] Dr. Semone confirmed Dr. Lordi's diagnosis and testified that Roane's spiral towards crime was entirely predictable and was not volitional or attributable to any moral weakness on Roane's part or the part of his family.

death of 30 friends and relatives. Counsel made the obvious point that persons subjected to such persistent violence become desensitized to it. Roane criticizes counsel for "failing to make reference to the literature regarding the effects of exposure to violence on cognitive and emotional development," Roane Opening Memo. Ex. Aff of Dr. Norton at ¶10, but fails to support that critique with citation to the literature or any specific proffer as to the content of that literature.

Having failed to demonstrate any omissions on the part of counsel's case in mitigation, Roane proceeds to challenge counsel's selection of witnesses. For example, Roane asserts that counsel should have called a more experienced expert than Crystal Noakes. The record does not suggest any reason why counsel's selection of Noakes was deficient. Indeed, counsel used Noakes' lack of criminal experience to emphasize Noakes' neutrality, noting that Roane's experts were not simply hired guns who regularly testified for defendants.[41] Roane fails to demonstrate that the selection of Noakes was detrimental, much less that it was deficient.

Finally, in Claim IV.E.2, Roane contends counsel was deficient for failing to present testimony from members of Roane's family. *See Bassette* v. *Thompson*, 915 F.2d 932, 940-41 (4th Cir. 1990) (noting that a claim that counsel was deficient for failing to call a witness must be accompanied by a specific proffer of the omitted witnesses' testimony). Roane's proof on this issue is limited to an affidavit from his mother, wherein she swears that she could have,

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[41] Counsel selected Noakes after the mitigation expert originally engaged by the defense, Dr. Lee Norton, withdrew because the Court limited his hours. The record reflects that Crystal Noakes, a specialist in assessing dysfunctional families, was recommended to counsel by the Governor's Commission on Mental Health and Retardation.

> described for the jury [Roane's] mental and emotional problems and our attempts to receive help for them. I could have described the circumstances of James' upbringing, as well as his effort to obtain additional education. I also would have told the jury that James is a human being, and that his family cares for him and begged the jury not to sentence him to death.

Roane Opening Memo Ex. Aff. Jeanette Roane at ¶4. Counsel was able to elicit this sympathetic information from its expert witnesses, and those experts laid part of the blame for Roane's condition at the feet of his mother who they suggested was too overwhelmed by her seven children to provide adequate care for Roane. Tr. at 3721, 3725, 3743-45, 3789-92. As the deficiencies of Roane's mother played a prominent role in the defense theory of mitigation, it was reasonable for defense counsel to conclude that Jeanette Roane might undermine that theory by casting her actions in a more favorable light. *See Beaver* v. *Thompson*, 93 F.3d 1186, 1196 (4th Cir. 1996) (concluding reliance on the credibility of reports and documents from disinterested parties rather than risk that defendant's family members might be discredited or testify adversely to defendant's interests on cross-examination was reasonable trial strategy); *Bunch* v. *Thompson*, 949 F.2d 1354, 1364 (4th Cir. 1991) (counsel reasonably eschewed calling father for fear he might downplay traumatic childhood of the defendant). Furthermore, counsel was able to convey to the jury that Roane's family loved and supported him without exposing Roane to the risk of placing family members on the witness stand. During her testimony, Crystal Noakes pointed out Roane's mother and other family members who were in the audience. And, Noakes concluded her testimony by telling the jury that Roane has a "very loving family, very loving attitude. They care about James." Tr. at 3796. In short, the record reflects that counsel reasonably eschewed presenting testimony that stood to do more harm

than good. Roane's Claims IV.E.1-2 will be dismissed for failure to demonstrate deficiency or prejudice.

B. Counsels' Failure To Introduce Evidence Of The Conditions The Defendants Would Face In Prison

Tipton V.F.2.b

Johnson IV.B.2,

Roane IV.E.3

Each of the Defendants fault counsel for not presenting evidence regarding the conditions they would face in prison. Even if such evidence were admissible, counsel reasonably chose to forego such tepid evidence in light its potential to expose them to damning evidence and argument from the prosecution. Defense attempts to suggest that the Defendants' confinement was sufficient punishment would permit the prosecution to introduce how the Defendants behaved while confined. Specifically, the Government indicated that both Roane and Tipton had a history of assaultive behavior while incarcerated. The Court had precluded the Government from introducing this evidence because the prosecution failed to include future dangerousness as an aggravating factor in the death notice. Counsel for Roane had further reason to forego such evidence since he had introduced evidence that Roane preferred jail to his home. Additionally, a defense expert on prison conditions would provide the prosecution with another opportunity to remind the jury that Tipton, Johnson and Roane had a proven inclination to engineer murders from behind prison walls. *See United States* v. *Johnson*, 223 F.3d 665, 673-78 (7th Cir. 2000) (noting that it is nigh impossible to prevent inmates from transmitting lethal messages to individuals outside the prison), *cert. denied*, 122 S. Ct. 71 (2001). Finally, any evidence on the harshness of prison conditions would have permitted the prosecution to compare such conditions to the

circumstances of the numerous victims of their crimes, particularly the incapacitated Greene sisters. Accordingly, counsel for the Defendants were not deficient for failing to introduce evidence of the Defendants' prison conditions.[42] Additionally, the Defendants cannot demonstrate prejudice because any mitigating benefit from such evidence was far outweighed by the harmful evidence and arguments that would have accompanied its introduction. *See Whitley* v. *Bair*, 802 F.2d 1487, 1494-97 (4th Cir. 1986) (emphasizing court must evaluate the negative aspects of any purportedly omitted mitigating evidence in evaluating prejudice). Accordingly, the above described claims will be dismissed.

C. Tipton's Counsel Failed To Present An Adequate Case In Mitigation

Tipton Claim V.F.2.a

Tipton contends that counsel failed to present sufficient evidence of his dysfunctional family life and his tender side. The record refutes such a claim. Mitigation evidence on this score was presented by Tipton's cousin, Tina Wilkinson, Hans Selvog, a clinical psychologist, and Brenda Williams, a family friend. Wilkinson testified that Tipton grew up in a home in which his mother was regularly beaten, first by Tipton's father and later by his mother's live-in boyfriend; that Tipton's mother and her boyfriend were addicted to heroin and used the drug on a daily basis; that Tipton was present when his uncle committed suicide with a shotgun; that Tipton's mother used to punch him; and that Tipton learned to take care of himself because of his adverse upbringing.

Wilkinson's testimony of Tipton's disturbing upbringing was reinforced by Selvog, a clinical social worker who had

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[42] The assertion by Johnson's trial counsel that the failure to introduce this evidence was not the result of strategic or tactical decisions does not alter the Court's conclusion that such an omission was not deficient.

interviewed Tipton and his relatives. Selvog described at length Charlene Tipton's (Tipton's mother) heroin addiction, including instances where she overdosed in front of Tipton and confined Tipton to the closet while she conducted all night drug parties. Selvog also related that Charlene would discipline Tipton by punching him in the face, and that Charlene was not attentive to Tipton's medical needs. Selvog testified that Tipton left his mother, but that his paternal grandmother, Ruby Tipton, refused to take him in. Thereafter, Tipton moved in with his father's girlfriend, Brenda Williams, in Richmond, Virginia. Tipton was happy to live with Williams but, recognizing that his presence was a financial burden to her, he told her he thought it was best if he moved on.

Brenda Williams then testified that while he lived with her, Tipton got a job, helped around the house and played with her children. Williams confirmed that Tipton left her home because he did not want to be a financial burden to her.

Based on the foregoing testimony, defense counsel argued, *inter alia*, that the following nonstatutory mitigating factors mitigated against a death sentence for Tipton:

> Tipton was subjected to emotional and physical abuse and neglect as a child and was deprived of parental guidance that was needed; Tipton suffers from frontal lobe brain dysfunction that went untreated when he was a child; Tipton was introduced to addictive drugs and alcohol while still a child; Tipton grew up in an impoverished, violent and brutal environment, and was exposed to extreme violence as a child and throughout his life.

Tipton Opening Memo Ex. H. The jury agreed; 10 or 12 jury members found each of the foregoing factors mitigated against a sentence of death and refused to impose such a

sentence on Tipton for the murders of Long, Armstrong, and Carter.

In his present claim, Tipton contends counsel was deficient for not calling his mother, grandmother and Victoria Harris. Tipton contends that had counsel called his mother and grandmother as witnesses they would have recounted his terrible childhood and begged for his life, while Harris would testify that Tipton lived with her for a time and she once saw him crying while reading a book about self-image. First, the decision not to call Tipton's mother, or maternal grandmother or Harris is reasonable because their testimony would have been cumulative of the evidence regarding Tipton's dysfunctional family and his sensitive side already heard by the jury. *See Bacon* v. *Lee*, 225 F.2d 470, 481-82 (4th Cir. 2000), *cert. denied* 532 U.S. 950 (2001). Second, Tipton has not supported his assertion that the omitted testimony was qualitatively superior to the presented mitigation evidence. *See Neal* v. *Puckett*, 239 F.3d 683, 694 (5th Cir. 2001) (noting court should consider "quality and volume" of omitted mitigating evidence) (citing *Williams* v. *Taylor*, 520 U.S. 362, 397-99 (2000)). For example, Tipton has not submitted, affidavits from any of these individuals which demonstrate that they were willing to testify consistent with his allegations. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Thirdly, the record suggests that the decision not to call Tipton's mother or Tipton's grandmother was reasonable because they may have tempered the description of Tipton's childhood and their absence would enforce the idea that Tipton had been abandoned by his family. Selvog indicated that Charlene Tipton and Ruby Tipton (the paternal grandmother) were not cooperative in preparing Tipton's defense. And, Tipton's mother requested Wilkerson to "make me look good" when she testified. Tr. at 3445. Hence, the absence of testimony by Tipton's immediate family emphasized that Tipton had been "abandoned" by his family, Tr. at 3909,

3911, and permitted counsel to bring this point home to the jury by asking "[w]here was his mother . . . When her son is on trial for capital murder, when he is facing the death penalty, his mother is concerned that she look good. Does that tell you why she was not here." Tr. at 3917. In light of the foregoing, counsel was not deficient nor was Tipton prejudiced by the absence of the witnesses he urges here. Tipton's Claim V.F.2.a. will be dismissed.

D. Johnson's Mental Ability Was Not Accurately Reflected By His I.Q. Test, And, In Fact, Was Below 77

Johnson Claim IV.B.1, Claim XI

Federal law provides that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 21 U.S.C. § 848(1); 18 U.S.C. § 3596(c). The Supreme Court has indicated that "[t]o be classified as mentally retarded, a person generally must have an IQ of 70 or below." *Penry* v. *Lynaugh*, 492 U.S. 302, 308 n. 1 (1989) (citing American Association on Mental Deficiency (now Retardation) (AAMR), Classification in Mental Retardation at 11 (H. Grossman ed. 1983)). In 1992, the association revised its classification to identify individuals with an IQ of 75 or below as presumptively retarded. *See* Tr. at 3690; *Atkins* v. *Virginia*, 122 S. Ct. 2242, 2245 n. 5 (2002).

In 1982, based on his performance on the WISC-R I.Q test, Johnson was found to have an IQ of 88. *See* Exhibit 14, Johnson's Reply Memo. When he was retested in 1985, Johnson was found to have an IQ of 69-74. *Id.* Counsel recognized the critical import of evidence that would demonstrate that Johnson was retarded. Therefore, in preparation for trial, on October 10, 1992, a defense expert, Dr. Cornell, administered a Wechsler Adult Intelligence Scale test ("WAIS test") to Johnson. Based on his performance on that test, Johnson was found to have an IQ of 77. Tr. at 3685.

Dr. Cornell was aware that if Johnson was found to have an IQ of 75 or lower, Johnson might be deemed mentally retarded and not eligible for the death penalty. Therefore, Dr. Cornell rechecked Johnson's scores, saw Johnson a second time, and consulted with colleagues in order to assure that Johnson's score of 77 was accurate. These efforts failed to reveal any evidence that undermined his conclusion that Johnson had an IQ of 77 and was not mentally retarded.

In Claim XI, Johnson contends his execution is barred because he is mentally retarded. In support of this claim, Johnson directs the Court to a paper published in 1996, subsequent to his trial, that states,

> Individuals appear to gain approximately 3-5 IQ points over a ten year period. Since the WAIS-R was published in 1981, this inflation factor could mean that the average IQ could be as high as 105-107 points rather than the accepted value of 100.

See Johnson Opening Memo Ex. 7, at 2, The Psychological Corporation, *An Introduction to the Wechsler Adult Intelligence Scale, 3ed, (WAIS-III)*, Tulsksy, Phd. (1996)). In support of the foregoing proposition, the 1996 paper cites to two articles published in 1984 and 1987.[43] However, Dr. Cornell's testimony that he checked his finding and consulted colleagues before concluding that Johnson was not mentally retarded belies the suggestion that Dr. Comell's analysis did not account for possible variations in his testing instrument. Nor has Johnson tendered any testimony from Dr. Cornell expressing doubt about his prior conclusion that Johnson is not mentally retarded. Finally, in preparation for his § 2255 motion, Johnson was

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[43] Flynn, J.R., *The Mean IQ of Americans: Massive Gains From 1932-1978*, Psychological Bulletin 95, 29-31 (1984); Flynn, J.R., *Massive IQ Gain in 14 Nations: What IQ Tests Really Measure*, Psychological Bulletin 101, 171-191 (1988).

granted another full opportunity to demonstrate that he is mentally retarded. *See* Clerk's Record #700 A & B, 701. Thereafter, Johnson rejected the Court's invitation to submit any new evidence of his mental retardation. *See* Clerk's Record #870-874. Hence, the record before the Court demonstrates that Johnson is not mentally retarded. Claim XI will be dismissed.

Undeterred by his own evidence that indicates he is not mentally retarded, in Claim IV.B.1, Johnson contends that counsel was deficient for failing to argue at sentencing that Johnson could not or at least should not be executed because Johnson was mentally retarded. Johnson contends that counsel was deficient for not realizing that Johnson's score on his latest WISC-R IQ test overstated his IQ. In support of this assertion, Johnson tenders an affidavit from trial counsel, who swears that he was not aware of any studies that suggested the IQ tests taken by Johnson may have over estimated Johnson's IQ. Johnson asserts that in light of his 1985 IQ test indicating he had an IQ of 69-74, and the 1992 test that showed Johnson was within a few points of being considered mentally retarded, counsel should not have relied on his expert's conclusion that Johnson was not retarded. Johnson asserts that counsel should have checked behind Dr. Cornell and discovered the studies that suggested the WAIS-R test inflated IQ scores and thereafter argued to the jury and the Court that Johnson was mentally retarded.

With regard to the competency of counsel's performance, the critical question here is whether, in light of the information described above, counsel's reliance on Dr. Cornell's evaluation of Johnson's IQ was reasonable. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984). In this regard, "a particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* Hence, where counsel is presented with a mental health report that refutes prior indications that his client had a potential mental health defense, counsel generally is not required to "second guess the contents of [the] report . . . . [and] spend valuable time pursuing what appeared to be an unfruitful line of investigation." *See Wilson* v. *Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (rejecting inmate's claim that counsel should have pursued mental health defenses where psychological report indicated inmate was competent to stand trial and not suffering from a significant mental disease or defect at time of the crime). Thus, the courts have consistently upheld as reasonable defense counsel's decision to abandon a particular mental health defense where expert examination determines such a defense is unfeasible. *See Pruett* v. *Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993); *Washington* v. *Murray*, 952 F.2d 1472, 1482 (4th Cir. 1992) (concluding counsel was not deficient for failing to suspect that subsequent experts would disagree with the diagnosis provided by the defense expert prior to trial).

Johnson fails to direct the Court to any laxity that should have caused counsel to doubt Dr. Cornell's conclusion that Johnson was not mentally retarded. Indeed, the record demonstrates that Dr. Cornell reached that conclusion after a careful analysis and consultation with colleagues. In light of Dr. Cornell's stated diligence and the standard for competent performance recited above, counsel was not deficient for failing to discover any purported overestimate of Johnson's IQ.

Johnson also suggests that despite Dr. Cornell's conclusion that Johnson was not mentally retarded, counsel should have nevertheless argued to the jury that Johnson was mentally retarded. Such a tactic fails to account for the loss of credibility that would flow from counsel arguing that

his client was mentally retarded when his own expert disputed that conclusion. Instead, at sentencing, counsel conceded that Johnson was not mentally retarded but that the same lack of blameworthiness that had led Congress to preclude the execution of the mentally retarded, warranted a life sentence for Johnson. In this vein, counsel emphasized that Johnson missed the technical definition of mental retardation by a mere two points on his latest IQ evaluation and suffered from severe learning disabilities. Such a tactic was entirely reasonable. Johnson's Claim IV.B.1 will be dismissed.

XII. INEFFECTIVE. ASSISTANCE OF COUNSEL AS CAUSE EXCUSING PROCEDURAL DEFAULT OF PROSECUTORIAL MISCONDUCT CLAIMS

Tipton V.B.3.d.v, V.F.1.j

Johnson II.C.4.f, IV.A.8,

In the above listed claims, Tipton and Johnson generally fault counsel for failing to stop the purported onslaught of prosecutorial misconduct. In order to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that: "(1) the prosecutor's remarks and conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial." *United States* v. *Golding*, 168 F.3d 700, 702 (4th Cir. 1999) (internal quotations omitted). Here, Tipton and Johnson contend that both of the above components were satisfied because during the guilt phase the prosecutors vouched for their witnesses, suggested that a government witness had passed a polygraph test, introduced inadmissible evidence that the Defendants were threats to the lives of witnesses, improperly emphasized that Tipton and the other defendants did not testify, treated Tipton and the other Defendants as a group, and duped the trial court into believing witnesses were in the witness protection program

in order to deny the Defendants access to the witnesses."[44] Of course, the question here is not whether the prosecution engaged in misconduct, but whether that misconduct, either individually or collectively, was so egregious that counsel's failure to challenge the misconduct at trial or on appeal denied Tipton and Johnson the right to effective assistance of counsel. It is to that question that the Court now turns.

A. Counsel Failed To Object To The Testimony Of Several Cooperating Witnesses Whose Testimony Violated 18 U.S.C. § 201(c)(2).

Tipton V.F.1.k.	Defaulted Tipton V.E.15
Johnson	Defaulted Johnson V.M
Roane IV.F	Defaulted Roane I.d.[45]

These claims are grounded in the now vacated panel decision in *United States* v. *Singleton*, 144 F.3d 1343 (10th Cir. 1998), *vacated on reh.'g en banc*, 165 F.3d 1297, 1299 (10t Cir. 1999). Title 18 U.S.C. Section 201(c)(2) does not prohibit the United States from offering leniency in exchange for testimony, *see United States* v. *Richardson*, 195 F.3d 192, 196-97 (4th Cir. 1999), or "from acting in accordance with the long-standing practice and statutory authority to pay fees, expenses, and rewards to informants even when the payment is solely for testimony, so long as

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[44] The Defendants' claims that the prosecution engaged in misconduct by introducing testimony without foundation and otherwise engaged in misconduct with regards to the CCE charges were rejected *supra* at Section V.C. and V.D. Tipton and Johnson also assert the prosecution engaged in the following misconduct at sentencing: the prosecution made unsupported argument regarding the conditions Johnson and Tipton would face in prison; the prosecution misled the jury into believing it had a duty to impose the death sentence; the prosecution argued that sentencing should be based on deterrence. The claims that the prosecution engaged in misconduct at sentencing are addressed *infra* at. XII.C.4.

[45] Roane suggests that novelty rather than ineffective assistance of counsel excused his default.

the payment is not for or because of any corruption of the truth of testimony." *United States* v. *Anty*, 203 F.3d 305, 311 (4th Cir. 2000). None of the Defendants have demonstrated that the United States offered a witness inducements "for or because of any corruption of the truth of [the] testimony." *Id.* Accordingly, the Defendants cannot demonstrate that counsel were deficient or that they were in any way prejudiced by the failure to raise the claim. The above described claims will be dismissed.

B. Purported Prosecutorial Misconduct With Regards To The Witness List

Tipton Defaulted V.E.5.

Roane Defaulted I.a

Tipton and Roane assert that "the prosecution improperly duped the trial court into permitting it to withhold its witnesses' addresses because they ostensibly had been placed in the federal witness protection program when in fact they had not." Tipton's Index of claims at 15-16. This claim lacks a basis in fact. The record before the Court indicates that the prosecution clearly indicated on the witness list that some witnesses were actually in the "Witness Protection Program" while others were merely "in protective custody" or "in protection." Clerk's Record #393 at 2; #416. The Court's Order of January 5, 1993 recognized the distinction between witnesses in protective custody or protection and those formally in the Witness Protection Program. Clerk's Record #397 at 1. The order did not direct the United States to provide defense counsel with any access to witnesses listed in the "Witness Protection Program" while the United States was required to make arrangements to permit defense counsel to meet with the witnesses "in protection" or "protective custody." *Id.* Nevertheless, the record indicates that the government provided defense counsel with an opportunity to speak with all witnesses in any protective status prior to trial.

However, the majority of witnesses declined to speak with defense counsel. On appeal counsel claimed that the Court erred by failing to provide him with addresses of the witnesses in the Witness Protection Program or some other form of protection. The Fourth Circuit rejected that claim noting that "[a]ccess was ultimately provided, and though appellants quarrel with its timing and its circumstances, they have offered nothing indicating that they were actually harmed by the delay." *United States* v. *Tipton*, 90 F.3d 861, 889 (4th Cir. 1996). Thus, counsel reasonably eschewed pressing the claim urged here by Roane and Tipton because the prosecution did not engage in any misconduct and they cannot demonstrate how they were harmed by the prosecution's conduct. Additionally, Roane and Tipton allege that this claim is not defaulted because the facts supporting this claim were not available at the time of his appeal. They fail to identify any recently discovered facts that support such an allegation of cause. Accordingly, the above described claims are defaulted and will be dismissed.

C. Purportedly Improper Comments By The Prosecution

Even when the prosecution makes inappropriate remarks, a defendant is not entitled to relief unless the offending remarks or conduct "prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial." *United States* v. *Adam*, 70 F.3d 776, 780 (4th Cir. 1995). The following factors are relevant to that inquiry:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. . . . (5) whether the prosecutor's r e m a r k s were invited by improper conduct of

defense counsel . . . , and (6) whether curative instructions were given to the jury.

See United States v. *Wilson*, 135 F.3d 291, 299 (4th Cir. 1998) (internal quotations and citations omitted). "These factors are examined in the context of the entire trial, and no one factor is dispositive." *Id.* However, the prosecutorial misconduct claims are defaulted and Tipton and Johnson must demonstrate cause and prejudice to excuse their default. As the discussion below reflects, while some of the prosecution's comments were improper, in no single instance (or collectively), do the aforedescribed factors so favor a finding of prejudice that counsel was deficient for failing to pursue the claim of prosecutorial misconduct.

1. The Prosecution Introduced Inadmissible Evidence Through Which They Vouched That The Defendants Were Threats To The Lives Of The Witnesses

Tipton Defaulted V.E.4.

Johnson Defaulted V.B

Johnson and Tipton complain that the Government improperly elicited testimony from Johnny Byrd, Hussone Jones, Denise Berkley, Denis Moody, Valerie Butler, Robert Davis, Stanley Smithers and Montez McCoy regarding their protective custody status to suggest to the jury that the Defendants posed an ongoing threat to the lives of these witnesses. "The Government may appropriately introduce evidence of their witnesses' participation in the Witness Protection Program in order to counter any inference of improper motivation or bias and, under some circumstances, may present this evidence on direct examination in anticipation of a defense attack upon the witnesses' credibility." *United States* v. *Melia*, 691 F.2d 672, 675 (4th Cir. 1982). The key question on this score is whether the prosecution was not merely using such

testimony to rebut, "the appearance of special treatment and improper motivation" but was unfairly exploiting the inference that fear of a particular defendant caused the witness to seek the state's protection. *Id.* at 675-6.

In the Defendants' opening statements and questions on cross-examination, defense counsel suggested that the Government's principal witnesses were testifying because they were simply "bounty hunters" seeking financial rewards and personal gain in exchange for their testimony. *See, e.g.*, 837, 849-54. Thereafter, the Court refused the Government's request to allow its witnesses to testify as to their protective custody status, unless and until, the defense opened the door on cross examination. Thus, when the defense counsel elicited that the Government was paying Hussone Jones' rent, on redirect Jones explained that he was in danger and had been placed in the Witness Protection Program. Denise Berkley's testimony about which the Defendants currently complain followed a similar sequence of events.[46] Although Berkley and Jones mentioned concerns for their safety, the prosecution did not attempt in either case to capitalize on these comments.

However, with respect to Denis Moody, Valerie Butler, Robert Davis[47], Stanley Smithers, and Montez McCoy, the prosecution jumped the gun and on direct examination elicited testimony about their participation in the Witness

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[46] On cross-examination, the defense elicited from Denise Berkley that the United States had relocated her and paid the majority of her bills. Defense counsel further suggested by the tenor of his questioning that the promise of such support was made as an initial inducement to get Berkley to cooperate. On redirect, Berkley explained that she received support because she feared for her safety and had asked to be placed in the Witness Protection Program.

[47] On cross-examination, defense counsel did attempt to impeach Davis regarding the benefits he had received in exchange for his testimony. Tr. at 1933-34, 1952.

Protection Program or about perceived threats to their safety. On direct examination, the prosecution asked Davis why he was testifying, to which he responded, "[m]y brother and sister got killed. And I felt I would be next." Tr. at 1906-7. On direct examination, Stanley Smithers explained that a state court had continued a show cause against him because he was currently in the Witness Protection Program. Tr. at 2099. On direct examination, eight year old Montez McCoy testified that the Marshals had moved his family to New York. Tr. at 2276. On direct examination, Valerie Butler explained that her children were not living with her because she was in the Witness Protection Program. Tr. at 2686. Although the above comments were technically improper and intentionally introduced, its potential for unfair prejudice was partly mitigated by the jury's understanding that the prosecution was countering the defense's repeated assertion that the witnesses were simply bounty hunters out for personal gain. *See United States* v. *Young*, 470 U.S. 1, 12-13, 17 (1985). Moreover, any impression that the Defendants posed a threat to the lives of the witnesses was not the result of the isolated comments cited above but the abundance of properly admitted evidence reflecting that Johnson and Tipton did not want to leave any untrustworthy witnesses to their crimes. For example, Montez McCoy's comment that he had been moved to New York can hardly been deemed to have unfairly prejudiced the defense in light of Butler's testimony regarding a three way phone call between Tipton, Johnson and Roane during which Tipton had told Roane and Johnson that they were dumb for not killing Montez McCoy and the other witnesses to the Torrick Brown murder. Roane then responded that he wanted to kill Martha McCoy and people were trying to locate her for that purpose. Tr. at 2728-29. Butler's testimony in this regard was corroborated by Hussone Jones who testified that he heard Tipton say that Roane

"should go back and get the kids" because there "[c]ouldn't be a witness" if there were "[n]o survivors." Tr. at 1580. Similarly, the record reflected that Chiles and Talley were murdered in part to stop them from testifying. Sterling Hardy testified that, while in jail, he told Lance Thomas that he was worried that Linwood Chiles was going to testify "against everybody." Tr. at 2191. Thomas told Hardy not to worry because Tipton and Johnson would "take care of" Chiles. Tr. at 2191. And, Johnson told Charles Townes he killed Chiles because he thought Chiles was talking to the police. Tr. at 1191-92; *see* Tr. at 2707. The record also suggests that Talley was murdered because Tipton and Roane thought he was involved with the police. Tr. at 1566-67. In summary, it would be nigh impossible to demonstrate unfair prejudice from the brief references to the safety concerns of witnesses because the Defendants were on trial for murdering several potential witnesses. The record was replete with admissible evidence of their efforts to eliminate anyone who posed a threat to the continued vitality of their drug enterprise and the defense invited many of the prosecution's closing comments by its repeated references to the witnesses as bounty hunters. Tipton and Johnson have not demonstrated that counsel were or that they were prejudiced by the failure to pursue the issue at trial or on appeal. The above listed claims will be dismissed.

2. The Prosecutors Suggested That A Government Witness Had Passed A Polygraph Test

Johnson Defaulted V.F.

Tipton Defaulted V.E.8

On redirect examination of Jerry Gaiters, the prosecutor asked Gaiters if he fully cooperated with the police with respect to the murder of Katrina Rozier and did everything that was requested of him, "including taking a

test." Tr. at 2428. Gaiters responded yes to each of these questions. *Id.* Counsel objected and moved for a mistrial. *Id.* The Court sustained the objection but denied the motion for a mistrial.

The Government concedes, as it must, that the reference to the polygraph was deliberate and improper. However, counsel reasonably eschewed requesting a specific curative instruction since such an instruction could likely draw more attention to Gaiters' ambiguous remark. Nor does this single reference to a "test," pertaining to the uncharged criminal conduct of the murder of Rozier, provide counsel with a strong claim for relief. *See United States* v. *Tedder*, 801 F.2d 1437, 1445 (4th Cir. 1986) (rejecting request for mistrial because brevity of polygraph remark without reference to results of test and witness' lengthy examination mitigated potential for prejudice). Hence, appellate counsel's failure to raise the issue on appeal was not deficient. *See Plath* v. *Moore*, 130 F.3d 595, 600-01 (4th Cir. 1997) (concluding petitioner could not demonstrate prejudice flowing from counsel's failure to object to brief reference to polygraph exam where results of exam were not mentioned and jury had ample opportunity to assess the witness' credibility); *see also Arnold* v. *Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997). Accordingly, the above described claims will be dismissed.

3. Purported Improper Remarks By the Prosecution During The Guilt Phase Arguments

a. Counsel were deficient for failing to object to prosecutor's improper closing arguments regarding the supervision element

Johnson II.C.4.d Defaulted II.C.3.b

Tipton V.B.3.d.(iii) Defaulted V.B.3.c.(ii)

After recapping the Government's evidence on the continuing series element, the prosecutor went on to the third and fourth elements[48] where he stated:

> The next thing we must have proven to you in order to find them guilty of a CCE is that it was undertaken with five or more people acting in conjunction. And, in deciding this remind yourself of the testimony of Gregg Scott about the New York Boyz. There were 30 or so New York Boyz operating in Trenton, each of whom recruited to themselves workers. In Richmond, when the New York Boyz came south with "Whitey," you had the following people, at least, who were working with them in the sale or distribution of cocaine. You had Denise Berkley, Priscilla Greene, Curt Thorne, Linwood Chiles, Jerry Gaiters, Sterling Hardy, "Papoose" Davis, Hussone Jones, Charles Townes, "Man Man,"

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[48] In order to convict a defendant of engaging in a continuing criminal enterprise the Government must prove:

> (1) defendant committed a felony violation of the federal drug laws; (2) such violation was part of a continuing series of violations of the drug laws; (3) the series of violations were undertaken by defendant in concert with five or more persons; (4) defendant served as an organizer or supervisor, or in another management capacity with respect to these other persons; and (5) defendant derived substantial income or resources from the continuing series of violations.

United States v. *Ricks*, 882 F.2d 885, 890-91 (4th Cir. 1989).

Maurice Saunders, Antwoine Brooks. You had the people from Charles City that were testified about. You had Pam Williams, Charlotte Moore, Greg Noble, Sam Taylor, and a number of others you have heard testimony about.[49]

So that aspect of the CCE is also very clearly proven in this case. That is not an issue.

What is an issue—let me back up as to the five or more people. You need not find that everyone of these people charged with the CCE, and charged with the CCE are "Whitey," "C.O." and James Roane, *you need not find that each and everyone one of these people supervised five or more persons themselves. You need only find as a group, there were five or more people involved in the distribution of cocaine,* [hereinafter the **first comment**] just here in the City of Richmond.

But what will be an issue and what you do need to determine in order to determine that indeed a CCE was operated by these people, Continuing Criminal Enterprise was operated by these people, is whether "Whitey," "C.O.," and "J.R." occupied a position of organizer or supervisor. And I suggest to you in that regard, the testimony is also clear and unequivocal. They came down with their source of supply from New York, their source of cocaine, and they orchestrated, organized the people we have already mentioned to you in a distribution outlet, a

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[49] Johnson and Tipton claim that as a matter of law none of the listed individuals were capable of being a CCE supervisee. As discussed in Section V, the Defendants cannot demonstrate any prejudice on this issue because the jury was properly instructed on the supervision element and there was an abundance of evidence supporting the conclusion that Berkley, Thorne, Gaiters, Chiles, Davis, Jones, Townes, Saunders and numerous others were supervisees.

> distribution network. Each and every witness who took that stand testified remarkably consistently concerning the relationship of one with another; that "J.R.," "O," and "Whitey," "V" were partners or bosses; that *they were the people who organized the workers, who went out and recruited the workers, who supplied the workers with the cocaine, and that those workers went forth and sold their cocaine on the streets of Richmond. That's all that is required by the law.* [the **second comment**] It is not required by the law, as will be argued, I suggest, that they need to provide explicit directions in and orders to each and every one of the people who sold cocaine for them. Although there has been testimony that indeed they supplied directions and orders to each and everyone of these people, that is not necessary for you to find them guilty of operating a Continuing Criminal Enterprise. The language is clear there. All you need to find is that they organized people. And indeed the evidence is clear and unequivocal that they organized a number of people here in the City of Richmond to sell drugs.

Tr. at 2983-86. The Tipton and Johnson argue that the prosecutor's statements misstated the law and encouraged the jury to convict the Defendants without proof that each Defendant acted as a supervisor or organizer with respect to five or more persons. Additionally, Tipton and Johnson assert that counsel should have objected to the following argument in rebuttal which they contend was inappropriate because the prosecutor sought to avoid the issue of supervision by focusing on inflammatory issues and suggesting that because the case involved drug distribution the jury should convict the Defendants.

> My colleagues have told you and told you and told you how there is no organization here. There is no management. There is no supervision. *They say all*

those things have to be done. It is not true. [the **third comment**] Judge Spencer will tell you what the law is and I will suggest to you the law is that it only requires a person to organize, to supervise or to supervise five or more people in a criminal activity. Mr. Cooley's little cute WonderBread-Safeway joke was interesting yesterday, but it didn't have anything to do with what we are about. *Because we are talking about illegal crack cocaine. We are talking about killings. And we are talking about the furtherance of that killing that was done for the furtherance of the conspiracy. The conspiracy to distribute crack cocaine and to make money.* [the **fourth comment**] It is not about the legal bread business or Safeway. It is a good analogy, but it does not make any difference. *We are talking about apples and oranges. We are talking about a criminal enterprise and a criminal nature. He is talking about a legitimate business.* [the **fifth comment**]

Tr. at 3187-88.

Taken in context, the second and third highlighted comments do not mislead the jury as to the supervision element. Rather, these comments simply remind the jury that the supervision element is disjunctive and the Government satisfies the element by demonstrating that the Defendant organized or managed or supervised five or more persons. The fourth and fifth comments were a fair response by the prosecutor to counsel's analogy that there was no supervision because their relationship to the workers was analogous to the Wonderbread-man who simply delivers his bread to the grocery store. Moreover, "the question we have to ask is not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection." *Bussard* v. *Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994); *see United States* v. *Young*, 470

U.S. 1, 13 (1985). Here, counsel reasonably eschewed objecting to the second through fifth comments because they were sufficiently within the bounds of fair argument.

Although the first highlighted comment is not an accurate statement of the law, Tipton and Johnson were not prejudiced by the absence of an objection. As noted previously, the Court instructed the jury that the supervision element required the Government to prove that each defendant individually supervised or organized five individuals. Tr. at 3211-12. The Court repeatedly instructed the jury that "your source as to the law is the Court," not the lawyers. Tr. at 887, *see also* Tr. 758-59, 972, 3193-95. And, the prosecutor reiterated that instruction.

> The Court will instruct you as to what the law is. What I say is the law, what any one of these counsel says is the law, is not necessarily what the law is. What the Court instructs you that the law is is what the law is. What the Court tells you is the law is the law that you must follow.

Tr. at 2961.[50] The Court's instructions, and the prosecutor's admonitions foreclose any suggestion that the jury applied the prosecution's single inaccurate statement of the law, rather than the appropriate instruction supplied to them by the Court. Accordingly, neither Tipton nor Johnson have demonstrated that they were prejudiced by counsel's failure to take action with respect to the first comment. The above listed claims will be dismissed.

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[50] The prosecutor prefaced his CCE argument with a reminder to the jury that "the Court is going to apprize you of what the law is." Tr. at 2982.

b. The prosecutors misled the jury by vouching (often in inflammatory terms) to their personal belief in the Defendant's guilt and the veracity of the prosecution witnesses

Johnson Defaulted Claim V.A

Tipton Defaulted Claim V.E.3

It is improper for a prosecutor to vouch for, or bolster the testimony of, its own witnesses. *United States* v. *Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993). "Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury." *United States* v. *Sanchez*, 118 F.3d 192, 198 (4th Cir. 1997). In asserting that appellate counsel were deficient for failing to pursue the claim urged here, Tilton and Johnson overstate the occasions the prosecutor engaged in impermissible vouching and ignore the abundance of curative instructions provided by the Court.

During closing argument, the prosecution made the following highlighted comments, which Tipton and Johnson assert were improper vouching.

> Closing statement is . . . to give us an opportunity to argue to you what *we believe, what inferences we believe* you should draw from the evidence.

Tr. at 2956-7.

> There is no 848 murder here, no murder in furtherance of a Continuing Criminal Enterprise charged here, because *we know*, it was murder over a woman. *We know* that Robin Cooper was the cause of that murder of Torrick Brown . . . *[w]e also know* that despite the fact that that murder occurred . . . and was done by James Roane other members of the conspiracy joined him to help that murder.

Tr. at 3003-4. The mere use of the words "we believe" or "we know" does not constitute improper vouching or bolstering because it was not done to suggest a personal belief in the credibility of a particular witness or imply to the jury that information known to the government but not placed before the jury corroborates the prosecution's version of events. *See United States* v. *Adam*, 70 F.3d 776, 780 (4th Cir. 1995) (noting that prosecutor's use of the phrase "I think" in an innocuous, conversational sense "d[id] not suggest an attempt to replace the evidence with the prosecutor's personal judgments"). Indeed, in both of the instances complained of above, the prosecutor's argument in the surrounding text directed the jury to consider the evidence as the barometer for judging what it should know or believe.[51]

The highlighted remark set forth below, though perhaps a misstep by the prosecutor, did not provide Johnson or Tipton with a viable basis for challenging their convictions.

> There is no evidence, ladies and gentleman, with the exception of Hardy, Sterling Hardy and Gaiters, that any of the people brought forth by the government and placed in this witness stand to provide evidence to you knowingly and willingly engaged in a murder . . . .
>
> * * * *
>
> . . . the government has told these people that the words that they give to you from that witness stand will not be used to prosecute them, with the exception of Hardy and Gaiters, who were knowingly involved in murders by their own testimony, who are facing sentencing in this Court, by this Judge, for their

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[51] Nor was the prosecution's references to the portions of the witnesses' plea agreements that required them to testify truthfully good fodder for an appeal. Tr. at 2968; *see United States* v. *Henderson*, 717 F.2d 135, 137-8 (4th Cir. 1983); *Jenner* v. *Class*, 79 F.3d 736, 739 (8th Cir. 1996).

> involvement in those murders. Ladies and gentlemen, again I remind you, you cannot penetrate a conspiracy without some of the participants in the conspiracy cooperating with you. It is not an exact science. Use-immunity agreements had to be given. *We feel like we gave use immunity only to those people who were not the murderers in this case.* There has been no evidence that anyone other than Richard Tipton, Cory Johnson, Lance Thomas, Sterling Hardy and Jerry Gaiters were involved in the murders.

Tr. at 2966-68. While the comment may be read to suggest factors not presented to the jury played a part in the distribution of use immunity, the unfair prejudicial effect was marginal because (1) it was isolated; (2) it did not deflect any plausible suggestion of guilt from one of the witnesses[52] onto the defendants; (3) the evidence of Johnson and Tipton's guilt of the murders was overwhelming; and, (4) the jury was instructed that comments of the attorneys were not evidence and that "the testimony of one who provides evidence against a defendant . . . . for immunity from punishment . . . must always be weighed by the jury with greater care and caution than the testimony of an ordinary witness . . . . such testimony is always to be received with caution and weighed with great care." Tr. at 3199-3200.

Indeed, the protective hedge of instructions issued by the Court provided a strong disincentive to appellate counsel hoping to demonstrate prejudice flowing from any improper comments by the prosecution. *See Bennet* v. *Angelone*, 92 F.3d 1336, 1346-7 (4th Cir. 1996); *United States* v. *Francisco*, 35 F.3d 116, 120 (4th Cir. 1994). At the outset of the trial, the Court explained that:

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[52] Although the defense counsel tried to implicate Byrd in the Talley death, as reflected *supra*, Tipton's guilt on that matter was overwhelming.

> Certain things are not evidence and it is important that you understand what is not evidence . . . . First of all, statements, arguments, questions by lawyers are not evidence. Objections to the questions are not evidence. . . . You should not be influenced by the objection or the Court's ruling on it. If the objection is sustained, ignore the question. If the objection is overruled, treat the answer like any other.

Tr. at 759. After opening statements, the Court admonished the jury that,

> [t]he evidence in this matter is what comes from the witness stand, the exhibits, and any stipulations. The statements, comments, arguments by lawyers are not evidence and should not be accepted as such. A classic example is that we had a couple of objections.

Tr. at 887-88. Finally, after closing arguments in the penalty phase, the Court instructed the jury:

> it is your duty to determine the facts. And in so doing, you must only consider the evidence that I have admitted in the case. The term 'evidence' includes the sworn testimony of the witnesses and the exhibits admitted into the record, and any stipulations or agreements between the parties.
>
> Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. . . . What the lawyers say is not binding upon you.

Tr. at 3194-95. Given the instructions provided to the jury and the evidence arrayed against their client, counsel wisely refrained from pursuing the claims urged here by Tipton and Johnson.

For example, Tipton and Johnson fault counsel for failing to raise on appeal an exchange where the prosecution purportedly vouched for Gaiters by the manner

in which it asked questions.[53] In light of the fact the objection was sustained and that Woody's subsequent proper testimony corroborated Gaiters' account, and the Court's instructions, any unfair prejudice to the defense was unmeasurable.[54] Next, Johnson and Tipton contend that the prosecution engaged in misconduct when it asked Roane's psychiatric expert whether he considered Roane to be "a virtual killing machine." Tr. at 3770. The Court sustained the objection. While the prosecution's question was improper, appellate counsel for Johnson and Tipton were hardly deficient for failing to pursue the issue on appeal; the question was not directed to their client, the objection was sustained, and the Court instructed the jury to ignore a question if any objection is sustained. The Defendants also complain about the manner in which the prosecution twice phrased its objections. Even if such remarks were improper, they were hardly worthy of appellate consideration. *See* Tr. at 1983, 2053-54.

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[53] The prosecution asked Detective Woody whether Gaiters "is telling the truth" regarding the Armstrong, Long, and Carter murders. Tr. at 2442-43. Counsel objected and the objection was sustained. Tr. at 2443. Detective Woody then testified that Gaiters had consistently described the motive and the manner in which Johnson had committed the triple murder. Tr. at 2443.

[54] The defense later called Woody as a witness. In response to defense questions, Woody testified that in consideration for information, the police had dropped a number of petty charges against Gaiters. Counsel asked whether a number of more serious charges including a murder charge, a rape charge and a robbery charge against Gaiters also had been dropped. Woody responded affirmatively to this question. On cross-examination, the prosecution asked if the murder, rape and robbery charges were dismissed in consideration for cooperation or because the "investigation revealed that he had not committed" the particular crime. Tr. at 2855. Woody responded that the charges were dismissed based on Gaiters' apparent lack of culpability rather than for any consideration for his cooperation.

Finally, Johnson and Tipton complain that the prosecution engaged in misconduct during the sentencing phase when twice during opening argument, and once during closing argument he referred to them as "mass murderers." Counsel reasonably abstained from appealing the issue because that appears to be a fair description of their clients. In light of the instructions provided, the context of the purportedly improper comments and the abundance of evidence, counsel reasonably decided not to appeal the issues urged by Tipton and Johnson in Claims V.E.3 and V.A and such claims will be dismissed.

c. The prosecutors misled the jury by treating the Defendants as a group, rather than as individuals

Tipton Defaulted Claim V.E.9

Johnson Defaulted Claim V.G.

During guilt phase closing arguments, the prosecution told the jury that,

> What happened on January 14th? James Roane, Cory Johnson, and Richard Tipton and 'V' Mack get Pam Williams to go buy this Intratec and the AA Arms handguns. What do they do with these guns next? They take them to 'Papoose' Davis' house . . . [Tipton's counsel's objection to the use of 'they' overruled] . . . They come up there that day on January 14th, get the guns, and go take a life, that of Peyton Maurice Johnson. They come back and brag about their marksmanship.

Tr. at 3176. Johnson contends that the prosecutor misled the jury because there was no evidence linking him to Williams' purchase of the handguns and Tipton contends there is no evidence that he shot Peyton Johnson. Johnson is simply wrong. Although Roane and Thomas accompanied Williams to the gun shop, Johnson gave Williams crack cocaine in partial payment for her aid in obtaining the guns

and told Williams' boyfriend that Williams was required to complete the transaction when she attempted to back out of purchasing the guns.

Although it may be reasonably inferred that Tipton approved of the murder of Peyton Maurice Johnson, it was imprecise and sloppy for the prosecution to suggest, during guilt phase closing argument, that Tipton had actually shot Peyton Johnson.[55] However, in light of the abundance of evidence of guilt, the precise verdict forms, and Court's instructions[56], appellate counsel would have had an impossible task in demonstrating their clients were prejudiced by the prosecutor's occasional collective references to the Defendants. Tipton and Johnson's challenges to the prosecutor's collective references during the sentencing phase are addressed below.

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[55] Tipton and Johnson also restate their complaint, rejected above (see *supra* first comment and fifth comment Section XII.C.3.a), that the prosecutor misstated the law when he suggested the supervision element was satisfied if the Defendants had collectively supervised five persons.

[56] At the beginning of the trial, the Court instructed the jury that, "Each defendant's case should be considered independently." Tr. at 35. After opening statements the Court stated, "one final thing before I make the admonishment and let you go: the defendants are charged in a number of Counts, and there are obviously four defendants. Each defendant is entitled to individual consideration. They cannot be grouped. When the time comes for you to decide guilt or innocence, you will consider each defendant individually, as it relates to each count in which that defendant may be charged." Tr. at 888. And the jury was admonished in closing instructions that "the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty should not control your verdict as to any other offense or any other defendant." Tr. at 3231.

4. Alleged Improper Comments By The Prosecution During The Penalty Phase

a. The prosecutors misled the jury by treating the Defendants as a group, rather than as individuals

Tipton Defaulted Claim V.E.9

Johnson Defaulted Claim V.G.

One of the nonstatutory aggravating factors was that the defendant was a knowing and willing member of a conspiracy which had as one of its goals the murder of individuals other than those for which the defendant was charged.[57] In opening statement at the sentencing phase, the prosecution suggested this factor was satisfied because, "it is clear that each one of them intended to kill other people to hide this conspiracy. They intended to kill Martha McCoy and her children because they survived and were witnesses." Tr. at 2228. "*Remember under the law of conspiracy, they are guilty of each and every one of the acts that they did together.*" Tr. at 3330.[58] Contrary to Tipton and Johnson's suggestion, the underlined comment was permissible because it does not encourage the jury to

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[57] To support that factor, the Government reintroduced the guilt phase evidence. The Government also presented further evidence that Johnson, Tipton, and Roane, while incarcerated, had planned to kill several witnesses: Johnson told another inmate he planned to kill Detective Woody; Roane told Douglas Cunningham, Martha McCoy's boyfriend, there was $10,000 "hit" on McCoy's life if she testified, and that McCoy's uncle "was going to be the next one," Tr. 3361; Tipton told Cunningham, "that something was going to happen to me if I was to testify," Tr. at 3359; and Willie Seward overheard Tipton using the phone to tell someone that "he wanted Detective Woody killed . . ." Tr. at 3385.

[58] Shortly thereafter, the prosecutor stressed that each defendant was "due individual consideration in your rendering of your verdict." Tr. 3332.

collectively assign blame based on membership in a conspiracy but based on jointly committed actions.

Next, Johnson and Tipton contend that the prosecutor made a number of collective references in closing argument that were improper. "They deserve the maximum punishment, ladies and gentlemen, because in addition to their drug dealing, they chose to kill ten people." Tr. at 3903; "We have been in trial for five weeks, the same length of time within a week that these three people killed ten –[59]." Tr. at 3945. "They know how to do these crimes." Tr. at 3948. Appellate counsel did not ignore these above comments by the prosecution. Rather, appellate counsel cited these comments to support their primary challenge to the Defendants' sentence; that the failure to conduct separate penalty hearings denied them individualized consideration. *See* Roane App. Brief at 120. In rejecting that argument the Fourth Circuit concluded that "the court's frequent instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk to acceptable levels." *United States* v. *Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) (noting any risk of unfair prejudice was diminished by the separate packets of penalty verdict forms for each Defendant and the Court remonstrances to the Government to "be specific" and to "do it individually" when objections were made). Appellate counsel's use of the prosecution's improper collective references to support his challenge to the joint penalty hearing, rather than in support of a separate claim of prosecutorial misconduct, reflects effective appellate advocacy. Moreover, the Court's repeated instructions foreclose any suggestion of prejudice.[60] Hence, Johnson

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[59] At this point, Tipton's counsel objected to the use of "these" and the amount of murders. The Court sustained the objection.

[60] The Court's closing instructions repeatedly emphasized that each defendant was to be judged individually. Tr. 3985-86, 4002. The Court repeated during closing instructions that the arguments

and Tipton's assertion that ineffective assistance of counsel excuses their default is rejected because they have not demonstrated that counsel was deficient or that they were prejudiced. Tipton's Claim V.E.9 and Johnson's claim Claim V.G will be dismissed.

b. The prosecutor misled the jury by improperly emphasizing that the defendants did not testify

Defaulted Tipton V.E.7

Defaulted Johnson V.E

Tipton and Johnson assert that the prosecutor engaged in misconduct when he repeatedly commented upon their silence. The most egregious of these comments occurred during the closing argument. The prosecutor noted that Tipton had told his experts about the deprivation of his youth which his experts had then conveyed to the jury, yet, "[h]ave you once seen from that witness stand this week an iota of remorsefulness from that man?" Tr. at 3897. Counsel objected. The Court sustained the objection and admonished the prosecutor "don't get stupid in the end of this, please." *Id.* Immediately, upon the conclusion of the prosecutor's argument the Court instructed the jury as follows:

> Mr. Vick, in the zeal of his argument, indicated that Mr. Tipton had spoken many times and openly to the defense expert and they took the stand and discussed that. He then followed that up with "But you haven't seen one iota of remorse from the witness stand."
>
> You cannot, you will not, ever require a defendant to take the stand. The defendant doesn't have to testify. The defendant doesn't have any burden to prove that he should not be put to death. The burden

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of lawyers were not evidence and it is the juror's recollection of the evidence that controls. Tr. at 3996.

> is on the government to prove beyond a reasonable doubt that a defendant should be put to death.
>
> As I will indicate to you in further instructions, as I've said to you earlier in the first part of the trial, the argument on the part of counsel is just that. It is not evidence. And you must consider it in that light. But under no circumstances are you to take that kind of argument as indicating that the defendant has an obligation to take the stand and tell you something, even if to indicate remorse. Do you understand?

Tr. at 3906-7. Later, the Court denied the Defendants' motion for mistrial. Tipton's counsel appealed that decision and the Fourth Circuit summarily rejected the claim. *United States* v. *Tipton*, 90 F.3d 861, 901 n.25 (4th Cir. 1996).

Tipton and Johnson contend that appellate counsel should have shorn up this claim by pointing to other instances where the prosecutor purportedly made improper comments about their silence. The following rule is used to assess whether argument by the prosecution constitutes an improper comment on the defendant's failure to testify, "[w]as the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" *United States* v. *Francis*, 82 F.3d 77, 78 (4th Cir. 1996) (quoting *United States* v. *Anderson*, 481 F.2d 685, 701 (4th Cir. 1973)). In answering that question, the Court must look to the context in which the comment was made. *See Francais*, 82 F.3d at 78. Because, as reflected below, the other remarks, in context, are not indicative of a manifest intent to comment upon the defendants' failure to testify and are more readily understood to comment upon the evidence and defense counsel's arguments, counsel reasonably eschewed pursuing the claims urged here by Johnson and Tipton. *See Bates* v. *Lee*, 308 F.3d. 411, 420-22 (4th Cir. 2002).

During the sentencing phase closing arguments, the prosecution summarized Johnson's case in mitigation as follows,

> As to Mr. Cory Johnson, he too says, "I've had a bad youth. I've got a learning disability. I should therefore be excused from blameworthiness for what I have done." You can't do that, ladies and gentleman. The testimony of the doctors who testified for him have made it clear that he knew right from wrong.

Tr. at 3898. The foregoing statement does not seek to impugn Johnson's silence. In fact, its most natural reading is to encourage the jury to give Johnson's statements conveyed though his experts the same weight as if Johnson had made them directly from the witness stand. *Cf. United States* v. *Walker*, 272 F.3d 407, 415 (7th Cir. 2001) (concluding similar attribution of testimonial evidence to defendant during closing argument was not outside the bounds of closing argument), *cert. denied*, 122 S. Ct. 1456 (2002).

Next, Johnson and Tipton complain that the prosecutor commented upon their silence, when during closing argument at the guilt phase, he argued that

> I suggest to you that the evidence has been clear and unequivocal . . . . That 11 people lie dead in the streets of Richmond, Virginia because those men with others, including "V," wanted to make themselves rich selling drugs, wanted to protect their drug business. . . . I suggest to you that . . . as to Count One of the indictment, the conspiracy count, that those gentlemen haven't truly argued to you, in either opening or in the questions presented to the witnesses during the trial, that they are not guilty of Count One. *They have implicitly conceded that indeed that they have sold drugs, that indeed they sold drugs together.*

> *Count One in this case has been implicitly conceded by defendants James Roane, Cory Johnson –*

Tr. at 2960. At this point the Court overruled an objection by Roane's counsel. The prosecution then continued,

> And I suggest to you through opening and through questioning of the witnesses in this case, there can be no great issue as to the guilt of James Roane, Richard Tipton, and Cory Johnson as to . . . the conspiracy count. Each of them admitted tacitly, if not implicitly, that they sold drugs. *Each of them admitted tacitly, if not implicitly, that they were together often. Each of them has admitted tacitly, if not implicitly that they sold drugs together in concert with each other.*

Tr. at 2961-62. Placed in context, the remarks are not of such character that the jury would naturally and necessarily take them to be a comment on the failure of the accused to testify; the highlighted remarks direct the jury to consider the evidence adduced and the comments by defense counsel, not the Defendants' silence, in evaluating whether the Defendants were guilty of conspiracy.[61] Therefore, the comments are not inappropriate. *See United States* v. *Mietus*, 237 F.3d. 866, 871-72 (7th Cir. 2001); *Oken* v. *Corcoran*, 220 F.3d 259, 270-71 n. 7 (4th Cir. 2000); *Francis*, 82 F.3d 77, 78 (4th Cir. 1996); *see also* Tr. at 2976. To the extent the prosecution's comments may have otherwise been improper, counsel reasonably forsook appealing the issue in light of the evidence of guilt on the conspiracy charge and their concessions during their own

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[61] Counsel for each defendant conceded in opening argument that his client sold drugs. During questioning of Government witnesses, defense counsels' questions generally focused on negating the substantial income and supervision element of the CCE count, rather than disputing that the petitioners were engaged in the concerted distribution of cocaine. Tipton also called Gloria Bridges as a witness. Bridges testified on direct examination that she came to know Titpon because he sold drugs.

opening statements and closing arguments that their clients were guilty of conspiracy to distribute drugs, but not of running a CCE.

Finally, Tipton and Johnson complain about an exchange that occurred during guilt phase closing argument. Counsel for Sandra Reavis stated, "But remember, Cory Johnson said that he never gave drugs to Sandra Reavis to sell. So this contradicts what Valerie Butler had to say." Tr. at 3163. The prosecutor objected by stating, "I don't remember Cory Johnson testifying, your Honor." *Id.* The Court sustained the objection. Defense counsel apologized and corrected his statement by stating, "Cory Johnson told Rodney Tucker, who testified here, that he never gave Sandra Reavis any drugs." Tr. at 3163-64. "No manifest intent exists where there is another, equally plausible explanation for the remark." *See United States* v. *Calderon*, 127 F.3d 1314, 1338 (11th Cir. 1997). The prosecutor's attempt to correct a misstatement by defense counsel does not manifest an improper intent to comment on Johnson's failure to testify. *See United States* v. *Smith*, 30 F.3d 568, 571 (4th Cir. 1994) (noting context of prosecutor's statement indicated an intent to object to form of the question rather than comment upon the defendant's silence). To the extent, the objection reminded the jury that Johnson had failed to testify, it did not encourage the jury to draw any negative inference from that omission and the Court repeatedly had admonished the jury that it could not draw such an inference. Accordingly, the above claims will be dismissed because Tipton and Johnson cannot demonstrate appellate counsel were deficient for not pursuing the claims.

c. The prosecution improperly made unsupported comments during closing argument regarding the conditions the Defendants would face in prison if given a life sentence.

Johnson Defaulted V.D

Tipton Defaulted V.E.2

During closing argument the prosecutor asked the jury to ponder what the Defendants' conditions would be if they were sentenced to life in prison.

> I'm not telling you incarceration is nice and a lifetime of incarceration is not punishment. But think about each and every day of existence in jail. They will wake up, bathe, be fed. They will be able to watch TV, read books. They will be able to use the telephone to talk to their loved ones.

Tr. at 3904. Defense counsel objected and the Court sustained the objection. Tr. at 3904. While the foregoing comments were improper, it did not provide counsel with a substantial claim for relief on appeal. The Court had made clear to the jury that the verdict was to be based on the evidence, the arguments of the lawyers were not evidence and it was not to consider matters to which objections had been sustained. Accordingly, counsel was not deficient for failing to raise the issue on appeal.

d. The prosecution improperly argued that sentencing should be based on deterrence

Johnson Defaulted V.H

Tipton Defaulted V.E.10

Tipton and Johnson contend that they were denied individualized consideration because the prosecutor twice urged the jury to consider deterrence during closing argument at the sentencing phase. The limited law on the subject indicates that a defendant's right to individualized consideration is not violated when the prosecutor urges the

jury to consider whether a sentence of death in this instance would further the specific deterrent purpose of the statute. *See Brooks* v. *Kemp*, 762 F.2d 1383, 1407 (11th Cir. 1985) (en banc), *cert. granted*, *Kemp* v. *Brooks*, 478 U.S. 1016 (1986) (vacating *Brooks* and remanding for further consideration in light of *Rose* v. *Clark*, 478 U.S. 570 (1986)), *reinstated on remand*, *Brooks* v. *Kemp*, 809 F.2d 700 (11th Cir. 1987)). Here, when the prosecutor began to make comments that could be construed as a general deterrence argument, he was cut short by an objection. Thereafter, the prosecutor focused his comments on why the deterrence goals of the CCE death penalty statute favored the imposition of a sentence of death for the acts committed by Tipton and Johnson. In light of the single comment about general deterrence, the sustained objection to that comment, and the extensive instructions on the Defendants' entitlement to individualized consideration, appellate counsel reasonably forsook the claims urged here by Johnson and Tipton.

e. The prosecutors misled the jury into believing that it had a duty to convict the Defendants and impose a death sentence

Tipton Defaulted Claim V.E.6

Johnson Defaulted Claim V.C

Tipton and Johnson assert that the prosecution affirmatively misrepresented the law to suggest to the jury that it was legally required to convict the Defendants and impose a sentence of death. *See Potts* v. *Zant*, 734 F.2d 526, 535-6 (11th Cir. 1984) (prosecutor engaged in misconduct by suggesting prior state supreme court decisions mandated imposition of death penalty in this case), *vacated on other grounds*, 478 U.S. 1017 (1986). Tipton and Johnson base these arguments on the prosecutor's repeated

references to "duty."[62] As reflected below, the challenged comments were proper because they emphasized that the jurors' duty to convict and impose the death penalty derived from their sworn obligation to fairly apply the evidence in light of the applicable law. *See Davis* v. *Kemp*, 829 F.2d 1522, 1527 (11th Cir. 1988) (concluding defendant not denied individualized consideration by prosecutor's argument that jurors had an obligation to impose the death penalty if they

---

[62] The highlighted comments to which Tipton and Johnson object are set forth below.

> You have taken an oath and you can't shirk from that oath. That oath says that you will truly render facts to a verdict. When you do that, *you have no choice but to find these defendants guilty of each and every count of the indictment.*

Tr. at 3021 (guilt phase sentencing).

> Now it is time for you to go back and do your duty.
>
> Each of you during the voir dire . . . stated that in the appropriate case, given the appropriate circumstances, that you could indeed render a verdict of death against a defendant . . . . I submit that based upon the evidence that you have seen from this witness stand over the last five weeks, that this is the appropriate case to render a verdict of death as to each and every defendant.
>
> You took an oath. It is an awesome responsibility. It is an awesome duty. But nonetheless, it is just that a duty. *Your duty, ladies and gentleman of the jury, given the argument that you have heard, requires no less verdict than death.*

Tr. at 3881-82.

> *. . . it is an awesome duty you have undertaken. But the law is clear that in some cases the death penalty should be imposed. It is the will of Congress. It is the law you must follow.* What you must determine, is given the evidence that you have heard, is this one those appropriate cases? And I suggest to you, ladies and gentleman, it is the appropriate case . . . .
>
> *Ladies and gentleman, it is a strong duty you have. But it is just that. It is a duty. This case warrants the imposition of the maximum punishment possible, the imposition of the death penalty as to each defendant.*

Tr. at 3905-6.

believed it was warranted by the defendant's crime and the evidence introduced at sentencing); *cf. United States* v. *Locasio*, 6 F.3d 924, 947 (2d Cir. 1993) (concluding it was not inappropriate for prosecutor to remind jurors of their oath to render a verdict without fear or favor).

Moreover, the Court's numerous instructions throughout the trial refuted any suggestion that the law required that the Defendants receive a sentence of death. "I want to emphasize that even if a jury makes such findings, it is never required to impose a sentence of death upon a defendant." Tr. at 36; 496-97. Again, at the beginning of the sentencing phase the Court reminded the jury that, "[i]t is the government that bears the burden of persuading you beyond a reasonable doubt that a sentence of death is justified as to each defendant." Tr. at 3307. "[E]ven if you do make the findings required by law as prerequisites to the imposition of the death penalty, no jury is ever required to impose the death penalty." Tr. at 3309. And, "[i]t is the government that must persuade you that the death penalty is justified as to each individual defendant. In short, a defendant is not required to prove that he should be allowed to live." Tr. at 3313. And, "you cannot return a decision imposing the death penalty absent a unanimous finding of the existence of certain aggravating factors, no jury is ever required to impose the death penalty, even if it does make such findings." Tr. at 3315. Hence, Tipton and Johnson's attempt to excuse their default is rejected because they have not demonstrated counsel were deficient or that they were prejudiced by any omission of counsel.

D. Cumulative Claims of Error With Regards To Prosecutorial Misconduct And CCE Convictions

Tipton Claim V.B.3.d.v. V.F.1.j — Tipton Defaulted V.E.14

Johnson Claim II.C.4.f, IV.A.8, IV.C — Johnson Defaulted V.L

Whether the prosecutor's improper conduct is isolated or extensive is one of the six factors relevant to assessing whether a defendant was prejudiced by improper comments by the prosecution. *See United States* v. *Wilson*, 135 F.3d 291, 298 (4th Cir. 1998). Thus, Tipton and Johnson contend appellate counsel should have exploited this factor and challenged all of the purportedly improper conduct on appeal.[63] In this regard, Tipton and Johnson must demonstrate their present claims of error were clearly more promising than the substantial claims counsel raised on direct appeal. *See Bell* v. *Jarvis*, 236 F.3d 139, 164 (4th Cir. 2000) (en banc), *cert. denied*, 122 S. Ct. 124 (2001); *Smith* v. *South Carolina*, 882 F.2d 895, 899 (4th Cir. 1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Neither Tipton nor Johnson meets this burden. The fact that habeas counsel has seen fit to regurgitate many of the same issues pressed by appellate counsel certainly belies the suggestion that appellate counsel made poor choices on appeal. Moreover, the appellate record confirms that counsel pursued the most promising claims for relief on direct appeal. *See Smith* v. *Murray*, 477 U.S. 527, 536 (1986) ("Winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.") Appellate

[63] That portion of these claims which challenges counsels' conduct at trial is rejected for the reasons previously stated by the Court.

counsel reasonably chose to pursue promising claims of instructional errors, separation of powers and errors during voir dire that would entitle their clients to relief under a more lenient showing of prejudice than would be required to prevail on a prosecutorial misconduct claim. *See, e.g.*, *United States* v. *Tipton*, 90 F.3d 861, 872-882, 895, 897-98 (4th Cir. 1996). Accordingly, the above listed claims will be dismissed because Tipton and Johnson have failed to demonstrate deficiency on the part of counsel.

XIII. CUMULATIVE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Tipton Claims V.B.3.d.vii, V.F.4

Johnson IV.D, IV.C

The Defendants contend that the cumulative effect of all counsel's errors prejudiced them. The cumulative analysis the Defendants seek is not permitted for those claims where the Court rejected their assertion that counsel performed deficiently. *Fisher* v. *Angelone*, 163 F.3d 835, 852-3 (4th Cir. 1998). "Attorney acts or omissions 'that are not unconstitutional individually cannot be added together to create a constitutional violation.'" *Id.* (quoting *Wainwright* v. *Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996)). Having reviewed those relatively few instances where the Court rejected an individual claim solely for a lack of prejudice, the Court finds even when considered collectively there is no reasonable possibility that the result of the Defendants' convictions or sentence would be different.[64] *See Huffington* v. *Nuth*, 140 F.3d 572, 583 (4th Cir. 1998). The Defendants' guilt and culpability were confirmed by numerous credible witnesses. The testimony of the witnesses was well corroborated by the physical

[64] Roane did not list in his index a separate claim of cumulative ineffective assistance. The Court's rejection of Roane's assertion of collective prejudice does not encompass Roane's Claim IV.B.2 pertaining to the murder of Douglas Moody.

evidence including forensic testing, receipts for firearms, the video tape of the murder scenes, and the testimony of other witnesses. The above claims will be dismissed.

XIV. THE DEFENDANTS' ADOPTION BY REFERENCE OF CODEFENDANTS' CLAIMS

Tipton V.J

Johnson X

Roane IX

In their initial § 2255 motion, each Defendant asserts that he adopts by reference any claims by his copetitioners to the extent such claims are applicable to him.[65] By Order entered December 11, 2000, the Court directed each Defendant to provide an index of his claims. Clerk's Record #830. That order further required each Defendant to list each of his grounds for relief including the subparts thereto and to cite to the portions of the record where the claim is raised and discussed.[66] This opinion has addressed every separate ground for relief listed by Tipton, Johnson, and Roane in his respective index. In light of the specific pleading requirements for § 2255 motions and this Court's orders, the oblique references to the unspecified claims of codefendants do not warrant further individual consideration. *Cf. Gray* v. *Netherland*, 99 F.3d 158, 165-66 (4th Cir. 1996) (concluding habeas petitioner had not properly raised claim in federal court where he failed to articulate how the fact and law combined to violate his rights). Claims V.J., X and IX will be dismissed for the reasons previously stated in conjunction with each claim specifically raised by Johnson, Tipton and Roane.

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[65] *United States* v. *Merlino*, 2 F.Supp.2d 647, 669 (E.D. Pa. 1997) (denying as inappropriate defendant's request to join codefendants' § 2255 motions).

[66] The Court warned the parties that review of their claims would be limited to those portions of the record designated in their individual index.

Tipton and Johnson's motion for relief pursuant to 28 U.S.C. § 2255 will be denied. Roane's motion for 28 U.S.C. § 2255 relief is denied in part.

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

Richmond, Virginia
Date: 5-1-03

APPENDIX D

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 03-13, 03-25, 03-26, and 03-27.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

CORY JOHNSON, DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD TIPTON, DEFENDANT-APPELLANT.

[Filed October 5, 2004]

On Petition for Rehearing and Rehearing En Banc

The defendants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Wilkinson, Judge King, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

2. The Drug Abuse and Prevention Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1236, codified as 21 U.S.C. § 848, provides in relevant part:

§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if–

(1) such person is the principle administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if–

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter–

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section–

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

* * * * *

Supreme Court, U.S.
FILED
JUL 27 2005
OFFICE OF THE CLERK

(3)

No. 04-1136

In the Supreme Court of the United States

JAMES H. ROANE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JOHN C. RICHTER
Acting Assistant Attorney General
ROBERT J. ERICKSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court committed reversible plain error by failing to instruct the jury that it must unanimously find the three or more predicate acts constituting the "continuing series of violations" required for conviction under the continuing-criminal-enterprise statute, 21 U.S.C. 848(c)(2).

2. Whether, to convict a defendant of engaging in a continuing criminal enterprise, the jury must unanimously find the identities of the "five or more other persons" whom the defendant organized, supervised, or otherwise managed, 21 U.S.C. 848(c)(2)(A).

3. Whether, in defending a drug kingpin charged with committing a series of capital murders, trial counsel rendered ineffective assistance in searching for, but failing to find, a motel receipt that—assuming petitioner would have been willing to testify at trial—could have marginally corroborated petitioner's asserted presence at a motel near the murder scene on the night of one of the murders, but could not have established petitioner's whereabouts at the time of the murder itself.

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In the Supreme Court of the United States

No. 04-1136

JAMES H. ROANE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 378 F.3d 382. The opinions of the district court (Pet. App 44a-63a, 64a-190a) are unreported. A prior opinion of the court of appeals is reported at 90 F.3d 861.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. A petition for rehearing was denied on October 5, 2004 (Pet. App. 191a-192a). On December 16, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 2, 2005. On January 24, 2005, the Chief Justice further extended the time within which to file a

petition for a writ of certiorari to and including February 22, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(a) (Count 2),[1] and three counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (Counts 5, 8, and 11).[2] Following the penalty hearing, the jury recommended that petitioner be sentenced to death on Count 5 (which pertained to the murder of Douglas Moody), but was unable to reach a unanimous sentencing recommendation with respect to the other capital counts (Counts 8 and 11). In accordance with the jury's recommendation,

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[1] Under 21 U.S.C. 848(c), a person engages in a "continuing criminal enterprise" if he violates any provision of Subchapter I or II of Chapter 13 of Title 21 of the United States Code as part of a "continuing series of violations" of either subchapter that are undertaken in concert with "five or more other persons" with respect to whom the defendant occupies any position of management and from which the defendant obtains substantial income or resources. See Pet. App. 18a (listing elements).

[2] Petitioner was also convicted on one count of conspiracy to possess with intent to distribute and to distribute cocaine base, in violation of 21 U.S.C. 846 (Count 1); four counts of using a firearm during and in relation to a crime of violence or drug-trafficking offense, in violation of 18 U.S.C. 924(c) (Counts 6, 9, 12, and 15); five counts of committing a violent crime in aid of racketeering activity, in violation of 18 U.S.C. 1959 (Counts 7, 10, 13, 14, and 16); and one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) (Count 32).

the district court sentenced petitioner to death.[3] The court of appeals affirmed all of petitioner's convictions and sentences except for his conviction and sentence on the drug-conspiracy count, *United States* v. *Tipton*, 90 F.3d 861 (4th Cir. 1996), and this Court denied certiorari, 520 U.S. 1253 (1997).

Petitioner thereafter sought collateral relief under 28 U.S.C. 2255. Following an evidentiary hearing, the district court granted the motion in part and denied it in part. Concluding that petitioner's trial counsel rendered ineffective assistance in his defense of the Moody murder, the district court vacated petitioner's convictions and sentences (including his death sentence) on Counts 5, 6, and 7. The district court denied petitioner's remaining claims. The court of appeals reversed the district court's decision vacating petitioner's convictions and sentences on Counts 5, 6, and 7, and affirmed the district court's denial of petitioner's other claims.

1. Petitioner and co-defendants Cory Johnson and Richard Tipton[4] were the principal "partners" in a large-scale drug-trafficking organization that originated in Trenton, New Jersey, in 1989, and thereafter operated in the Richmond, Virginia, area between 1990 and 1992. Pet. App. 3a. The partners regularly received powder cocaine from suppliers in New York City, cooked the powder cocaine into crack, and distributed it through a network of 30 to 40 street-level dealers. *Ibid.* The conspiracy became exceedingly violent in its later stages. During a short period in early 1992, petitioner, Johnson,

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[3] On the remaining counts, petitioner was sentenced to an aggregate prison term of life plus 65 years.

[4] Johnson (No. 04-8850) and Tipton (No. 04-8856) have also filed petitions for a writ of certiorari. The government is responding to those petitions in a separate brief.

and Tipton "were variously implicated in the murders of ten persons within the Richmond area—all in relation to their drug-trafficking operation and either because their victims were suspected of treachery or other misfeasance, or because they were competitors in the drug trade, or because they had personally offended one of the 'partners.'" *Ibid.* (quoting *Tipton*, 90 F.3d at 868). Petitioner was convicted on three capital murders (he was implicated, but uncharged, in a fourth) and on one non-capital murder.

a. *The uncharged Talley murder.* On January 4, 1992, petitioner and Tipton drove one of their underlings, Douglas Talley, to a deserted area in South Richmond. Talley had recently mishandled the proceeds of a $1000 crack-cocaine consignment. He was also suspected of being a police informant. After Tipton and petitioner got out of the car to confer, Tipton got into the front seat next to Talley and petitioner got into the back seat behind him. Petitioner then grabbed Talley from the rear, while Tipton stabbed him to death. In all, 84 stab wounds were inflicted to Talley's head, neck, and upper body during an attack that lasted between three and five minutes. Pet. App. 4a; Gov't C.A. Br. 5-6.[3]

b. *The Moody murder (Count 5).* On successive nights in January 1992, rival drug dealers Douglas Moody and Peyton Maurice Johnson were killed in order to eliminate unwanted competition. A day or two before Moody was killed, petitioner retrieved a pistol that an underling, Robert "Papoose" Davis, had stored for Johnson. Thereafter, in the early morning of January 13, 1992, petitioner and Tipton went to Moody's apart-

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[3] Tipton was convicted and sentenced to death for the Talley murder, but petitioner was not substantively charged.

ment, where Tipton twice shot Moody in the back. Moody, however, was able to escape from the apartment by jumping through a window. Petitioner and Tipton pursued Moody, with petitioner stopping at a nearby apartment to retrieve a military-style knife that another underling, Priscilla "Pepsi" Greene, had kept for the partners' use. Petitioner and Tipton found Moody in the yard outside the apartment. Petitioner followed Moody into an adjoining alley, where he stabbed Moody to death. Petitioner immediately returned the knife to "Pepsi" Greene and instructed her to dispose of it. Petitioner and Tipton then went to "Papoose" Davis' house, telling Davis that they had "got him" and that it was "hot" on the street. Pet. App. 4a; Gov't C.A. Br. 6.

c. *The Peyton Maurice Johnson murder (Count 8).* Later in the day on January 13, 1992, Pam Williams agreed to purchase semiautomatic firearms for petitioner in exchange for crack cocaine. Petitioner accompanied Williams to a gun store, where he pointed out three 9mm. semiautomatic pistols that he wanted her to buy. Williams then completed the federal firearms-transaction forms. On January 14, 1992, after her 24-hour identification check had been completed, Williams picked up the three firearms, paying $1492 in cash that petitioner had given her. Petitioner, Cory Johnson, and an associate known as "E.B." then placed the guns in a tote bag and delivered them to "Papoose" Davis for safe keeping. Several hours later, after retrieving the weapons with Cory Johnson and "E.B.," petitioner searched the neighborhood for Peyton Maurice Johnson, finally locating him in an illegal tavern. A short time later, Cory Johnson and an unidentified accomplice entered the tavern and shot Peyton Johnson to death. Petitioner, Cory Johnson, and "E.B." then returned the guns

to "Papoose" Davis, instructing him to wipe off the fingerprints. Ballistics tests connected the murder weapons to two of the firearms that Williams had purchased for petitioner earlier that day. Pet. App. 4a; Gov't C.A. Br. 8-9.

d. *The Louis Johnson murder (Count 11).* On the evening of January 29, 1992, petitioner was riding in his car with Cory Johnson and another drug kingpin, Lance Thomas. When they pulled into an alley, petitioner saw Louis Johnson walking with a group of men. Louis Johnson was a bodyguard for a rival drug dealer who was believed to have threatened Cory Johnson with a shotgun on a previous occasion. Petitioner stopped the car, got out, approached Louis Johnson, and shot him. Cory Johnson and Thomas thereafter fired at Louis Johnson with semiautomatic pistols. Either Cory Johnson or Thomas then shot Louis Johnson twice at close range as he lay wounded on the ground. Pet. App. 4a-5a; Gov't C.A. Br. 9.

e. *The Brown murder (Count 14).* On February 1, 1992, petitioner, Johnson, and Thomas met outside the apartment of Torrick Brown, whom petitioner suspected of "messing around" with one of his girlfriends. Petitioner knocked on the door, which was answered by Brown's step-sister, and asked to see Brown. When his step-sister summoned Brown to the door, petitioner and his confederates opened fire with semiautomatic pistols, killing Brown and seriously wounding his step-sister. Petitioner was arrested the following day in a police raid, and the semiautomatic weapons that petitioner had purchased were seized. Tipton and Johnson remained at large and committed other CCE-related murders, including a double killing on February 19, 1992, that resulted in the death of another underling, Linwood

Chiles, and the serious wounding of "Pepsi" Greene. Pet. App. 5a-6a; Gov't C.A. Br. 10.

2. At trial, "Pepsi" Greene and another underling, Denise Berkley, testified as eyewitnesses to petitioner's fatal stabbing of Moody. C.A. App. 4423-4432, 4492, 5272-5277, 5294-5300, 5304. "Papoose" Davis testified that he had provided a pistol to petitioner shortly before the murder and that petitioner and Tipton had said that they "got him" and that it was "hot" on the street when they visited his house immediately after the murder. *Id.* at 4623-4626. Another co-conspirator, Sterling Hardy, testified that he had overheard a jailhouse conversation between petitioner and Tipton in which they were trying to determine the identity of a woman to whom they gave a knife. *Id.* at 4916-4918.

In addition to impeaching both Greene and Berkley, C.A. App. 4485-4495, 5292-5304, petitioner's trial counsel presented evidence suggesting that Moody had been murdered by someone other than petitioner. For example, Gina Taylor, a neighbor of Moody's, testified that she saw a short, thin person stabbing Moody in the alley outside his house. Although she could not identify the person, she testified that the assailant could not have been petitioner because of his diminutive size. *Id.* at 5626-5631, 5636. A police detective confirmed that Taylor had described the killer as a short, thin black male during an interview soon after the murder. *Id.* at 5652-5654. Another police detective testified that he had been told by Moody's mother that a person named Keith had been looking for her son shortly before he was murdered; that some of Keith's friends had broken into her house a week earlier, armed with automatic weapons; and that her son was hiding from a person named Maurice on the day he was killed. *Id.* at 5655-5656,

5659-5660. Based on the information obtained from Moody's mother, the detective testified, the initial focus of the investigation had been on "Little Keith" Barkley, a small-featured black male (*id.* at 5652-5655), but the focus changed, according to the detective, once "Pepsi" Greene gave her account of the murder a few weeks later. Petitioner did not testify.

3. On direct appeal, the court of appeals addressed various challenges to the district court's instructions on the CCE charge, including a claim that the jury should have been advised that it "must be unanimous as to which three (at least) predicate violations each [defendant] committed and which five (at least) persons each [defendant] supervised." *Tipton*, 90 F.3d at 885. The court of appeals noted that none of the defendants had "requested a 'special unanimity' instruction on these two elements," and that none had "objected to the court's failure to give one sua sponte." *Ibid.* The court therefore reviewed the claim "only for plain error," and it found "none warranting correction." *Ibid.* The court held that, assuming "a special unanimity instruction is required, upon request, as to the predicate violation element," the defendants "could have suffered no actual prejudice" from the lack of one, because "the jury unanimously found each [defendant] guilty of at least five predicate violations: the conspiracy charged in Count 1, the drug possession charged in Count 32, and at least three of the § 848(e) murders." *Ibid.* As to "a special unanimity instruction on the five supervisees element," the court of appeals held that "none is required." *Ibid.*

4. After the affirmance on direct appeal, petitioner filed a Section 2255 motion collaterally attacking his convictions and sentences, including his capital convic-

tion and death sentence for the Moody murder. C.A. App. 332-339. As relevant here, petitioner alleged that his trial counsel performed deficiently by inadequately investigating and defending the Moody murder charge. *Id.* at 384-386. In support of that allegation, petitioner made an evidentiary proffer (1) that Demetris Rowe, a purported eyewitness to Moody's murder, had stated that the murder was committed by Johnson and Tipton and that petitioner was not present; (2) that petitioner had informed one of his trial counsel, David Baugh, before trial that he was at a Richmond motel at the time Moody was killed and that a woman (Carmella Cooley) could account for his presence at the motel; (3) that Baugh had interviewed, but had not called as a witness, the woman identified by petitioner, and had attempted to obtain, without success, corroborating motel records; and (4) that petitioner's Section 2255 investigator had found a motel receipt from a Howard Johnson's motel in Richmond, showing that "Larry Chiles," of 1016 Clay Street, checked into the motel for an overnight stay on January 12, 1992 (the night of Moody's murder) and that "Linwood Chiles," also of 1016 Clay Street, checked into the same motel for an overnight stay on January 2, 1992. See *id.* at 467, 1168-1173, 2110-2111.

At an evidentiary hearing on the ineffective-assistance claim, petitioner testified that, although he supported himself through drug trafficking in January 1992 (C.A. App. 2141, 2144) and associated with Tipton, Johnson, and other members of the conspiracy, he had not been involved in Moody's murder. According to petitioner, he and co-defendant Sandra Reavis[6] spent

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[6] Reavis was tried with petitioner, Tipton, and Johnson. She is currently serving a 16-year sentence on a drug-trafficking conspiracy

the night Moody was murdered together at a Howard Johnson's motel in Richmond, and petitioner did not learn about Moody's murder until they checked out the next morning. *Id.* at 2149, 2160-2161. Petitioner testified that, on the evening of January 12, Linwood Chiles drove petitioner, Reavis, and Carmella Cooley (a friend of Reavis's) to the motel, and Chiles rented a room with cash provided by petitioner. According to petitioner, Chiles and Cooley departed shortly thereafter, but petitioner and Reavis remained in the motel room until check-out time the next morning. *Id.* at 2152-2160, 2166-2167, 2169. Petitioner testified that he told Baugh he had not killed Moody, but instead had been at the motel with Reavis, Cooley, and Chiles. *Id.* at 2161-2162, 2165-2166.

Reavis corroborated petitioner's alibi, testifying that Chiles and Cooley had taken petitioner and her to the motel around 9:00 p.m. on January 12, and that she and petitioner had spent the entire night together at the motel. C.A. App. 2126-2128. Reavis testified that she could clearly recall the events of that evening because the Richmond police had initially charged her as a participant in Moody's murder. *Id.* at 2128. Reavis conceded, however, that she had not told the police during an interview shortly after the murder that she and petitioner were in a motel at the time of the murder or that Chiles and Cooley knew of her and petitioner's whereabouts on the night of the murder. *Id.* at 2130-2131, 2133.

Baugh testified that petitioner had told him before trial that he was at a motel, in the company of Reavis,

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conviction. See *United States* v. *Reavis*, 48 F.3d 763 (4th Cir.), cert. denied, 515 U.S. 1151 (1995).

Chiles, and Cooley, on the night of the murder, and that Chiles rented the room. C.A. App. 2176-2178, 2178d. Baugh testified that he had visited the motel in an attempt to locate corroborating records, but was unable to find any. *Id.* at 2176-2178, 2178b. Baugh also interviewed Cooley before trial, but recalled that "she was not cooperative or * * * helpful," that her attitude "border[ed] on hostile," and that "she couldn't give [him] a date" to corroborate an alibi. *Id.* at 2178. Baugh testified that he would have subpoenaed Cooley "[i]f she had provided * * * a solid, corroborable alibi," but, based on his interview, he decided not to call her as a defense witness. *Id.* at 2178n-2178o.

Baugh also testified that he would have done things differently at trial if he had had the receipt showing that "Larry Chiles" had rented a room at the motel on January 12. While acknowledging that "there [we]re problems" with the fact that the motel receipt bore another person's name, Baugh said that the receipt could have provided "some kind of objective confirmation" that would have permitted petitioner to testify about his whereabouts on the night of Moody's murder. C.A. App. 2178d-2178e, 2178q-2178r, 2178v. Although he did not know whether he could have "put [petitioner] there [at the motel] on th[at] date," Baugh testified that the records would at least have given him "a good starting point to determine some form of corroboration." *Id.* at 2178v-2178w.

Finally, Demetris Rowe gave her account of the Moody murder. She testified that she had been sitting on a porch across from the alley in which Moody was murdered for much of the evening, drinking "pints of gin" with a friend. C.A. App. 2178y-2179. According to Rowe, she heard loud hollering and the sounds of a fight

coming from the house where Moody lived, and then saw Moody emerge from the doorway of the house while struggling with Johnson. *Id.* at 2179-2181, 2184-2185. Rowe testified that she also saw "Pepsi" Greene, Curt Thorne ("Pepsi" Greene's boyfriend and later a murder victim of Tipton and Johnson), Tipton, and an unknown person emerge from the house. *Id.* at 2180-2185. Rowe said that petitioner was not in the group, and that she had seen petitioner and Reavis leave together in a taxi cab at approximately 8:30 p.m. *Id.* at 2181-2182, 2187-2183, 2190.

5. The district court granted petitioner Section 2255 relief. Pet. App. 44a-63a. Concluding that his trial counsel had been deficient in failing to locate the motel receipt and that petitioner had been prejudiced as a result, the district court vacated petitioner's convictions and sentences on the three counts related to the Moody murder (Counts 5, 6, and 7), including his death sentence on the Section 848(e) murder count.[7]

a. The district court explained that defense counsel relied on a misidentification theory for the Moody murder, suggesting that Moody had been killed by someone other than petitioner. Pet. App. 48a-49a. Counsel did not present an alibi defense, even though, as the district court found, petitioner told counsel that he had not killed Moody, that he and Reavis had spent the night in a motel near the location where Moody was murdered, and that the couple had been accompanied to the motel by Carmella Cooley and Linwood Chiles, the

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[7] In a separate opinion, the district court rejected petitioner's claims that were unrelated to the Moody murder and denied the Section 2255 motions filed by Tipton and Johnson in their entirety. Pet. App. 64a-190a.

latter of whom had driven the group to the motel and rented the room for cash. *Id.* at 49a.

The district court found that counsel had investigated petitioner's claimed alibi to some extent. The court found that Baugh had interviewed Cooley, who recalled having accompanied petitioner and Reavis to the motel on one occasion but could not recall the exact date, and that Baugh had "concluded that Cooley's ignorance of the date and her apparent hostility made her a bad defense witness." Pet. App. 50a. The court also found that Baugh had "contacted the Howard Johnson's and asked if the hotel had a record of Linwood Chiles renting a room on January 12, 1992," and that, after being told that it did not, Baugh "went to the hotel and attempted to find such a record himself." *Ibid.*

The court found, however, that Baugh had "limited his search to looking for a record of a room rental under the name of Linwood Chiles for the night of January 12, 1992," and that Baugh could locate no such record. Pet. App. 50a. By contrast, petitioner's Section 2255 investigator had been able to locate a "Larry Chiles" motel receipt for the night of January 12, 1992, after only a few hours of searching through archived records at the motel. *Id.* at 50a-51a. The court found that Baugh "could have located the same documents" if he "had subpoenaed the records" or "spent three hours looking through the hotel records." *Id.* at 51a. Had Baugh discovered the motel records, the court found, petitioner "would have testified consistent with his [exculpatory] testimony at the evidentiary hearing." *Ibid.* And based on petitioner's "demeanor and the details of his account," the court found that petitioner's "testimony that he was at a hotel at the time of the Moody murder, although not compelling, was tenable." *Id.* at 52a.

b. Applying the legal standard in *Strickland* v. *Washington*, 466 U.S. 668 (1984), to the facts that it found, the district court concluded both that trial counsel had been constitutionally deficient in failing to locate the motel receipt and that it was reasonably probable that the jury's verdict on the counts related to the Moody murder would have been different but for trial counsel's deficient investigation. Pet. App. 54a-59a.

In concluding that counsel had performed deficiently, the court explained that counsel had "substantial information" indicating that petitioner's "claim that he was at a hotel at the time of the Moody murder was credible," and therefore "had every reason to believe the hotel records would provide objective evidence to corroborate [petitioner's] story." Pet. App. 55a. Although the court "d[id] not doubt counsel's testimony that he called the hotel a couple of times and on one occasion went to the hotel to find the records," the court determined that "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* at 56a. The court thus held that trial counsel's failure to locate the motel records and to present an alibi defense was "attributable to the unreasonably limited amount of time and resources counsel devoted to looking for corroborative hotel records." *Id.* at 57a.

In concluding that counsel's deficient performance had prejudiced petitioner, the district court acknowledged that the evidence of petitioner's guilt was "strong," and that the motel receipt was only "somewhat," "indirectly," and "marginally" corroborative of

the asserted alibi, which was itself "thin." Pet. App. 57a-58a. The court nevertheless concluded that petitioner's thin alibi defense would have sufficiently bolstered the misidentification defense to create a reasonable probability of acquittal on the Moody murder counts. *Id.* at 58a.[5]

6. The court of appeals reversed the district court's grant of Section 2255 relief as to the Moody murder counts and affirmed the district court's denial of petitioner's other claims for relief. Pet. App. 1a-43a.

a. With respect to the Moody murder counts, the court of appeals held that the district court had "erred in concluding that [defense counsel's] representation of [petitioner] was deficient under the first prong of *Strickland*." Pet. App. 39a-40a. The court of appeals agreed that counsel "had reason to believe that the hotel records could generate an alibi for [petitioner]," and that he "was therefore obligated to make a reasonable investigation of them." *Id.* at 40a. Assessing the reasonableness of counsel's investigation without "the distorting effects of hindsight" and with "a heavy measure of deference to counsel's judgments," *id.* at 41a (quoting *Strickland*, 466 U.S. at 689, 691), however, the court of

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[5] The district court rejected petitioner's other ineffective-assistance claim, which was based on his counsel's failure to call Rowe as a witness. Pet. App. 54a. The court found that, to the extent that it exculpated petitioner, Rowe's testimony "was not credible and would carry no weight with a jury." *Id.* at 53a. The district court also rejected petitioner's claim that he was "actually innocent" of Moody's murder. *Id.* at 59a-63a. The court concluded that petitioner's "thin alibi, even when coupled with Gina Taylor's testimony, and the evidence suggesting third parties wished to do Moody harm, [wa]s not sufficiently compelling to preclude many a reasonable juror from finding [petitioner] guilty of murdering Moody in light of the formidable direct and circumstantial evidence of [petitioner's] guilt." *Id.* at 62a.

appeals determined that counsel's "performance was constitutionally reasonable and thorough," *id.* at 42a. The court explained that

> [David Baugh] interviewed Carmella Cooley, who could not remember when she stayed at a hotel with [petitioner]. He called the hotel and requested records of Linwood Chiles from the *only relevant night*—the night of the murder. And when that search was not fruitful, he went to the hotel and searched for the records himself. Only after this final step in the investigation did Mr. Baugh turn to and focus on [petitioner's] misidentification defense.

Ibid. "In these circumstances," the court of appeals "decline[d] to act as a Monday-morning quarterback and second-guess Mr. Baugh's efforts, simply because we are now armed with more information and the benefit of hindsight." *Ibid.* The court noted that "this case does not involve a situation where counsel neglected to investigate, or where his investigation was so cursory that we can now—eleven years on and with the benefit of hindsight— declare it constitutionally unreasonable." *Id.* at 42a-43a.

Quoting the Sixth Circuit, the court of appeals pointed out that "what the lawyer did not miss is 'just as (or more) important as what the lawyer missed.'" Pet. App. 43a (quoting *Coe* v. *Bell*, 161 F.3d 320, 342 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999)). And what petitioner's trial counsel did do, the court said, he did in a "diligent and highly effective" manner. *Ibid.* In particular, Baugh

> conferred with [petitioner], * * * investigated the crime scene, * * * located an eyewitness to

> the Moody murder who provided a physical description of a murderer dissimilar to [petitioner], * * * learned that Moody's mother had advised the police that another man had been searching for Moody hours before his murder, and * * * aggressively and professionally cross-examined the Government's witnesses.

Ibid. In short, the court explained, petitioner's counsel investigated the "weak" alibi defense and elected to "put on a strong misidentification defense" only "when the [alibi] investigation proved unfruitful." *Ibid.*

The court of appeals also expressed "considerable doubt" that petitioner was prejudiced by counsel's failure to discover the motel receipt. App., *infra*, 2a n.15.[9] The court explained that the district court had found the testimony of all three of the government's witnesses to the Moody murder to be "credible and corroborated by physical evidence," but had found the testimony of petitioner's potential alibi witnesses to be "much less credible." *Ibid.* In light of those credibility determinations, the court of appeals said that

> [i]t would be difficult for this [alibi] testimony (not to mention the fact that [petitioner] would have been subject to cross-examination about the other murders and his extensive criminal record), plus one motel receipt, in someone else's name, placing [petitioner] a mere two miles away from

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[9] Footnote 15, in which the court of appeals elaborates on its "considerable doubt," is omitted from the opinion that is reprinted in the appendix to the petition. Compare Pet. App. 40a with 378 F.3d 382, 409 & n.15 (4th Cir. 2004). The section of the opinion that discusses petitioner's ineffective-assistance claim, including footnote 15, is reproduced in an appendix to this brief.

> the murder scene, to create a reasonable probability that, but for the lack of such evidence, "the results of the proceeding would have been different."

Ibid. (quoting *Strickland*, 466 U.S. at 689).

b. In otherwise affirming the district court's decision, Pet. App. 13a-39a, the court of appeals rejected petitioner's claim for relief based on the district court's failure to give, *sua sponte*, a special unanimity instruction on the three or more predicate acts composing the "continuing series of violations" required for conviction under the CCE statute. *Id.* at 19a-20a. The court of appeals noted that it had assumed on direct appeal what *Richardson* v. *United States*, 526 U.S. 813 (1999), subsequently held—namely, that there is a unanimity requirement—but had concluded that petitioner and his co-defendants were not entitled to relief under the plain-error standard because the jury "unanimously found each guilty of at least five predicate violations." Pet. App. 19a (quoting *Tipton*, 90 F.3d at 885). The court went on to say that a *Richardson* instructional error is "a procedural defect rather than a structural one," and reiterated that petitioner could not have been prejudiced by the error in light of the jury's unanimous verdicts finding him guilty of more than a sufficient number of predicate violations to satisfy the "continuing series of violations" requirement. *Id.* at 20a.[10]

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[10] The court of appeals also rejected Johnson and Tipton's claim that the district court erred by failing to give a special unanimity instruction with respect to the identities of the "five or more other persons" that each of them organized, supervised, or otherwise managed during the course of the CCE. Pet. App. 20a-21a. "Not only has this claim been inexcusably defaulted by Johnson and Tipton's failure to raise it either at trial or on direct appeal," the court said, the claim also fails on the

ARGUMENT

1. *Richardson* v. *United States*, 526 U.S. 813 (1999), holds that jurors must agree on the three or more predicate acts that constitute the "continuing series of violations" element, see 21 U.S.C. 848(c)(2), of a CCE offense. While neither petitioner nor his co-defendants requested a jury instruction to that effect, petitioner contends (Pet. 13-17) that, for two independent reasons, the failure to give such an instruction was reversible error. The court of appeals correctly held otherwise, and its decision does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted.

a. Petitioner argues (Pet. 16-17) that the instructional error was a structural error that requires automatic reversal. This Court has denied petitions that raise the same claim, see *Monsanto* v. *United States*, 125 S. Ct. 153 (2004) (No. 03-10349); *Dean* v. *United States*, 532 U.S. 943 (2001) (No. 00-6619), and there is no reason for a different result here.

In *Richardson*, the Court reserved the question whether the failure to give a unanimity instruction on the "continuing series of violations" element in a CCE case was amenable to harmless-error review. 526 U.S. at 824. The Court has since made clear, however, that an instruction that "omits an element of the offense" altogether "does not *necessarily* render a criminal trial fundamentally unfair," and that such an error is therefore subject to harmless-error analysis. *Neder* v.

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merits, because "*Richardson* did not change the rule 'that the jury need not unanimously agree on which five persons were organized, supervised, or managed by the defendant.'" *Ibid.* (quoting *United States* v. *Stitt*, 250 F.3d 878, 886 (4th Cir. 2001), cert. denied, 535 U.S. 1074 (2002)).

United States, 527 U.S. 1, 9 (1999). As petitioner acknowledges (Pet. 17), every court of appeals to consider the question has therefore recognized that an instruction that merely omits the unanimity requirement with respect to an element of the CCE offense cannot be categorized as structural.[11] As one of those courts has explained, "[b]ecause *Richardson* errors affect only the way the jury is instructed on an element of the offense, they do not taint the trial 'from beginning to end' or undermine 'the framework within which the trial proceeds.'" *United States* v. *Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991)), cert. denied, 541 U.S. 1011 (2004).

b. In the alternative, petitioner argues (Pet. 13-16) that this Court should grant certiorari to resolve an asserted circuit conflict on how harmless-error analysis applies to *Richardson* claims. Like the court below, however, every other court of appeals to consider the question has concluded that a *Richardson* error is harmless where, as here, the jury found the defendant guilty of three or more predicate offenses that are suf-

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[11] See, *e.g.*, *United States* v. *Rivera*, 347 F.3d 850, 851-852 (10th Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *United States* v. *Montalvo*, 331 F.3d 1052, 1056-1057 (9th Cir. 2003), cert. denied, 541 U.S. 1011 (2004); *Ross* v. *United States*, 289 F.3d 677, 681-682 (11th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1113 (2003); *Santana-Medero* v. *United States*, 260 F.3d 133, 139 (2d Cir. 2001), cert. denied, 534 U.S. 1083 (2002); *Lanier* v. *United States*, 220 F.3d 833, 838-839 (7th Cir.), cert. denied, 531 U.S. 930 (2000); *United States* v. *Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States* v. *Long*, 190 F.3d 471, 476 n.3 (6th Cir.), cert. denied, 528 U.S. 1032 (1999); *United States* v. *Escobar-de Jesus*, 187 F.3d 148, 161-162 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000).

ficient to satisfy Section 848's "continuing series of violations" element.[12]

It is true, as petitioner points out (Pet. 14-15), that some courts have explicitly addressed the "relatedness" of the predicate offenses as part of the harmless-error analysis.[13] But there is no indication that the relatedness of the predicate offenses was genuinely at issue in any of the cases in which relatedness was *not* independently assessed, and no court of appeals has taken the position that unrelated Title 21 predicate offenses can satisfy Section 848's "continuing series of violations" element. Certainly the Fourth Circuit has not. In *United States* v. *Brown*, 202 F.3d 691 (2000), the case in which the Fourth Circuit first held that *Richardson* errors are subject to harmless-error analysis, the court cited the First Circuit case on which petitioner relies and stated that a *Richardson* error is harmless "if the jury that convicted a defendant on a CCE charge also convicted that defendant of at least three *related* drug violations, and the *related* violations were also alleged to be predicate violations constituting the 'continuing series.'" *Id.* at 699-700 (citing *United States* v. *Escobar-de Jesus*, 187 F.3d 148, 162 (1st Cir.

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[12] See, *e.g.*, *Rivera*, 347 F.3d at 852; *United States* v. *Green*, 293 F.3d 886, 889-890 (5th Cir.), cert. denied, 537 U.S. 965 and 982 (2002), and 538 U.S. 981 (2003); *Santana-Madera*, 260 F.3d at 140-141; *Muse* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000); *Escobar-de Jesus*, 187 F.3d at 161-162.

[13] See *Muse*, 200 F.3d at 906 (instructional error is harmless if "jury necessarily made factual findings establishing that [the] violations were related to one another"); *Escobar-de Jesus*, 187 F.3d at 162 (noting that evidence introduced to prove predicate offenses, including their "proximity in time and identity in purpose," also "establishes inescapably their relatedness").

1999), cert. denied, 528 U.S. 1176 (2000)) (emphasis added). Subsequently, in *United States* v. *Stitt*, 250 F.3d 878 (2001), cert. denied, 535 U.S. 1074 (2002), the Fourth Circuit found *Brown*'s "relatedness" requirement satisfied where three of the predicate offenses of which the defendant was found guilty were Section 848(e) murders committed in furtherance of the CCE. *Id.* at 884 nn.4-5.

Any "relatedness" challenge to the predicate convictions in this case would likewise fail. As in *Stitt*, the CCE count incorporated by reference the other Title 21 counts charged in the indictment and alleged that those incorporated violations (including the CCE-related murder counts) were "part of a continuing series of violations" for purposes of the CCE offense. C.A. App. 90. And as in *Stitt*, any three of the five predicate offenses of which petitioner was found guilty (a drug conspiracy count, a substantive drug-trafficking count, and three CCE-related murder counts) "are sufficient to constitute the 'three related drug violations' necessary to satisfy the requirements of *Brown*." *Stitt*, 250 F.3d at 884 n.5 (quoting *Brown*, 202 F.3d at 700). See also *Tipton*, 90 F.3d at 887 (noting, on direct review, that the jury instructions required, and the evidence established, a "substantive connection between the murders and the continuing criminal enterprise").

c. Even if the court of appeals' holding that "the trial court's failure to give a *Richardson*-type instruction did not prejudice [petitioner]" (Pet. App. 20a) conflicted with the decision of another court of appeals, this case would not be a suitable vehicle for resolving the conflict. Petitioner forfeited his claim by failing to raise it in the district court, see *Tipton*, 90 F.3d at 885; Pet. App. 19a-20a, and would not be entitled to relief even if

the error were prejudicial. A showing that an error to which there was no objection is "prejudicial," or even that it is "structural," does not, by itself, establish reversible plain error. A defendant must also show that the error was "plain"—*i.e.*, "clear" or "obvious"—at the time of appeal and that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997) (internal quotation marks omitted). The error in this case was not plain at the time of petitioner's direct appeal, which antedated *Richardson*, and given that the jury unanimously found petitioner guilty of at least five related predicate CCE violations, it is highly doubtful that the error can be said to have seriously affected the fairness, integrity, or public reputation of judicial proceedings, cf. *United States* v. *Cotton*, 535 U.S. 625, 632-633 (2002); *Johnson*, 520 U.S. at 469-470.[11]

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[11] Although petitioner lists in his questions presented (Pet. i) the question whether a special unanimity instruction is required with respect to the identities of the "five or more other persons" whom he organized, supervised, or otherwise managed during the CCE, 21 U.S.C. 848(c)(2)(A), petitioner presents no argument in support of this claim, and instead incorporates by reference (Pet. 17 n.2) the arguments made in the petitions filed by co-defendants Johnson and Tipton. Unlike his co-defendants, however, petitioner did not raise this claim in the district court (see Pet. App. 84a-90a), and the district court refused to consider claims that were merely adopted by reference (*id.* at 189a). Petitioner also did not raise the claim in the court of appeals (see Pet. C.A. Br. 19-96), which addressed the "five or more other persons" unanimity issue only with respect to petitioner's co-defendants (see Pet. App. 20a-21a). For that reason, as well as the reasons set forth in our brief in opposition to the petitions filed by Johnson and Tipton, see 04-8850 & 04-8856 Br. in Opp. 29-33, certiorari on this claim is unwarranted.

2. Petitioner also contends (Pet. 17-22) that the court of appeals failed to accord proper deference to the district court's factual findings in holding that—contrary to the conclusion of the district court—defense counsel rendered reasonable professional assistance in investigating and presenting a defense to the Moody murder counts. Petitioner is mistaken. Whether counsel's performance was constitutionally reasonable is a mixed question of law and fact, not a purely factual question, and, under the applicable *de novo* standard of review, it was correctly resolved against petitioner by the court of appeals. Further review is therefore unwarranted.

a. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant raising a Sixth Amendment ineffective-assistance-of-counsel claim must demonstrate both that counsel's performance was so deficient as to fall "below an objective standard of reasonableness" (*id.* at 688) and that, as a result of counsel's unprofessional errors, "there is a reasonable probability that * * * the results of the proceeding would have been different" (*id.* at 694). As *Strickland* makes clear, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and

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Without specification, petitioner also asserts that he "joins in * * * the remaining contentions raised by Tipton and Johnson." Pet. 17 n.2. But "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," Sup. Ct. R. 14.1(a), and none of the "remaining contentions raised by Tipton and Johnson" (Pet. 17 n.2) is listed in petitioner's questions presented or fairly included within any question that is. As explained in our brief in opposition to the petitions filed by Johnson and Tipton, moreover, see 04-8850 & 04-8856 Br. in Opp. 14-17, 34-40, there would be no basis for review of these "remaining contentions" (Pet. 17 n.2) even if petitioner had properly presented them.

fact" (*id.* at 698), and thus are subject to *de novo* review. See *Williams* v. *Taylor*, 529 U.S. 362, 400 (2000) (opinion of O'Connor, J.) (*Strickland* claims are subject to plenary review, except where displaced by 28 U.S.C. 2254(d) in habeas corpus cases brought by state prisoners).[15] The court of appeals expressly invoked this standard, stating that it would "review de novo mixed questions of law and fact addressed by the district court—including the issues of whether a lawyer's performance was constitutionally adequate." Pet. App. 13a. And, with respect to the specific ineffective-assistance claim at issue here, the court of appeals said that it would "review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective," and would "defer to its findings of fact unless they are clearly erroneous." *Id.* at 40a. Petitioner cites no decision that reviewed a lower court's determination on either the performance or the prejudice component of a *Strickland* claim deferentially.

b. Reviewing the district court's decision under the proper standard of review, the court of appeals correctly concluded—contrary to the district court's determination—that defense counsel's investigation of the Moody murder charges was professionally reasonable.

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[15] See also *United States* v. *Harris*, 408 F.3d 186, 189 (5th Cir. 2005) ("Ineffective assistance of counsel is a mixed question of law and fact that this Court reviews de novo."); *United States* v. *Regalos*, 405 F.3d 691, 692-693 (8th Cir. 2005) ("When addressing post-conviction ineffective assistance claims brought under § 2255, we review the ineffective assistance issue *de novo* and the underlying findings of fact for clear error."); *Cooper* v. *United States*, 378 F.3d 638, 640 (7th Cir. 2004) ("The district court's denial of a § 2255 motion for ineffective assistance of counsel is reviewed de novo[.]").

i. This Court has repeatedly stated that "[j]udicial scrutiny of a counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight," so that the conduct can be evaluated "from counsel's perspective at the time" and in light of all the circumstances. *Bell* v. *Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). The requirement that counsel's performance be scrutinized deferentially is based on the recognition that it is "all too tempting" for a convicted defendant to "second-guess counsel's assistance" and "all too easy" for a court to find an act or omission "unreasonable" because it was "unsuccessful." *Strickland*, 466 U.S. at 689. Accordingly, courts "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell* v. *Cone*, 535 U.S. at 702 (quoting *Strickland*, 466 U.S. at 689).

The same principles apply when the decision at issue is an investigative one. This Court's cases make clear that a pretrial investigation is "measured for 'reasonableness under prevailing professional norms,'" which "includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,'" *Wiggins* v. *Smith*, 539 U.S. 510, 523 (2003) (quoting *Strickland*, 466 U.S. at 688-689), and that courts must "apply[] a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691. That means that, while "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[,] * * * strategic choices made after less than complete investigation are [likewise] reasonable * * * to the extent that reasonable professional judgments support the

limitations on investigation." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690-691).

ii. The court of appeals accepted the district court's finding that defense counsel "possessed information suggesting that [petitioner] might be telling the truth about staying at the Howard Johnson hotel the night of Moody's murder." Pet. App. 40a. That information, the court of appeals concluded, gave counsel "reason to believe that the hotel records could generate an alibi [defense]," and, accordingly, "obligated [counsel] to make a reasonable investigation of them." *Ibid.* The court of appeals also accepted the district court's findings regarding counsel's unproductive interview of Carmella Cooley; his requests for motel records pertaining to Linwood Chiles's renting of a room on the night of the Moody murder (January 12, 1992); and counsel's unsuccessful efforts in personally searching the motel's records for a receipt for Linwood Chiles on the night of the Moody murder. *Ibid.* In addition, the court of appeals accepted the district court's findings about the investigation conducted by petitioner's Section 2255 investigator, during which the investigator spent a number of hours searching through motel occupancy records and located a January 2, 1992, receipt for Linwood Chiles and a January 12, 1992, receipt for "Larry Chiles." *Id.* at 11a-12a, 41a.

The court of appeals disagreed only with the district court's conclusion that defense counsel performed deficiently in failing to undertake an investigation of the same breadth as was later conducted by petitioner's Section 2255 investigator. The court of appeals concluded that defense counsel had reasonably confined his search to records for Linwood Chiles for January 12, 1992—the night of the Moody murder, and thus "the

only relevant night" (Pet. App. 42a) (emphasis omitted) —and had reasonably focused his defense on a misidentification theory once his properly focused records search proved unsuccessful. These conclusions are applications of law to fact that are dispositive of the "performance" component of petitioner's *Strickland* claim; the district court's contrary conclusion on the adequacy of counsel's conduct is not a purely factual finding that is entitled to deference. On the contrary, as *Strickland* and the cases that apply it make clear, any deference that was owed was owed to trial counsel. See, *e.g.*, *Bell* v. *Cone*, 535 U.S. at 698, 702; *Strickland*, 466 U.S. at 689-691.

c. Certiorari is also unwarranted because, even if petitioner could show that his counsel performed deficiently, it is unlikely that he could establish a reasonable probability that the result of the trial would have been different. Although it found no need to decide whether petitioner was prejudiced by his counsel's failure to locate the "Larry Chiles" motel record, the court of appeals "express[ed] * * * considerable doubt * * * on whether prejudice could have ensued here." App., *infra*, 2a n.15. There is good reason for such doubt.

As the court of appeals observed, the testimony of the government's three eyewitnesses implicating petitioner in the Moody murder was "credible," with the testimony of the principal eyewitness deemed to be "particularly compelling," and was "corroborated by physical evidence." App., *infra*, 2a n.15. By contrast, the testimony of the potential alibi witnesses, including petitioner himself, was found to be "much less credible." *Ibid.* Indeed, the district court found that Reavis's testimony was "unpersuasive," Pet. App. 52a; that

Rowe's testimony appeared to be "a fabrication," *id.* at 60a; and that petitioner's "self-serving" testimony was not "inherently reliable or trustworthy," *id.* at 61a, particularly since the idea that petitioner spent the night of Moody's murder in a motel with Reavis "does not sit comfortably alongside [his] proven participation" in other murders of his organization's rivals, *id.* at 63a. As the court of appeals observed, moreover, petitioner would have been subjected to "cross-examination about the other murders [he committed] and his extensive criminal record." App., *infra*, 2a-3a n.15. Finally, the alibi defense itself was "a weak one" (Pet. App. 43a), inasmuch as the less-than-credible witnesses, together with a motel receipt in someone else's name, would have placed petitioner "a mere two miles away from the murder scene" (App., *infra*, 3a n.15). Under these circumstances, it is not likely that petitioner would be able to establish a Sixth Amendment violation even if this Court were to conclude that his counsel's performance was unreasonable.

d. Nor is there any reason to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Rompilla* v. *Beard*, 125 S. Ct. 2456 (2005), which was decided after the petition in this case was filed. See Pet. 21-22 (suggesting that petition be held pending decision in *Rompilla*). *Rompilla* "simply applies [this Court's] longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*." 125 S. Ct. at 2469 (O'Connor, J., concurring). Its narrow holding is that, "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available," counsel "is bound to

make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Id.* at 2460. This case does not involve a failure to "look at a file [that defense counsel] knows the prosecution will cull for aggravating evidence," much less a file that was "sitting in the trial courthouse, open for the asking." *Id.* at 2467. Instead, the issue in this case is whether counsel performed reasonably when he pursued his investigation of a potential guilt-phase defense to its natural limits and abandoned it only when the investigation failed to unearth the motel record that was the object of the search. The question whether counsel's search for a single record was objectively reasonable under the circumstances is fully informed by *Strickland* and the many cases that apply it; *Rompilla* does not alter the analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JOHN C. RICHTER
Acting Assistant Attorney General
ROBERT J. ERICKSON
Attorney

JULY 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 03-13, 03-25, 03-26, and 03-27

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

CORY JOHNSON, DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD TIPTON, DEFENDANT-APPELLANT.

Argued: May 6, 2004
Decided: Aug. 9, 2004

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* * * * *

IV.

Finally, we turn to the Government's appeal in No. 03-13, challenging the district court's ruling that Roane's counsel, David Baugh, was constitutionally ineffective for failing to properly investigate Roane's alibi defense for the Moody murder. *See* Roane Opinion at 2-11. The court found that Mr. Baugh's investigation into Roane's potential alibi failed both prongs of *Strickland*, i.e., (1) his performance was deficient, and (2) his deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Because the district court erred in concluding that Mr. Baugh's representation of Roane was deficient under the first prong of *Strickland*, we reverse its vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven.[15]

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[15] Because Mr. Baugh's performance was not deficient under *Strickland*, we need not decide whether his performance prejudiced the defense. *See Williams v. Kelly*, 816 F.2d 939, 946-47 (4th Cir. 1987). We express our considerable doubt, however, on whether prejudice could have ensued here. The court found the testimony of all three witnesses who implicated Roane in the Moody murder—Berkley, Davis, and Pepsi Greene—to be credible and corroborated by physical evidence. And Greene's testimony was deemed to be "particularly compelling." Roane Opinion at 4. Conversely, the court found the testimony of the potential alibi witnesses to be much less credible—Reavis's testimony was "flat and unpersuasive," and she would not have testified at trial anyway; Roane's testimony was "tenable" but "not compelling"; Rowe's testimony was "not credible" and "would carry no weight with a jury"; and Cooley could not remember the date on which she went to a hotel with Roane. *Id.* at 5-7. It would be difficult for this testimony (not to mention the fact that Roane would have been subject to cross-examination about the other murders and his

The district court concluded that Mr. Baugh had a duty to investigate Roane's potential alibi. As the court explained, Mr. Baugh possessed information suggesting that Roane might be telling the truth about staying at the Howard Johnson hotel the night of Moody's murder—(1) Gina Taylor, an eyewitness, claimed that Roane did not commit the murder; (2) Mr. Baugh had received a detailed account of the alibi from Roane, who had been candid about his participation in other crimes; and (3) Carmella Cooley acknowledged that she had visited a hotel with Roane. *See* Roane Opinion at 9. Armed with this information, we agree that Mr. Baugh had reason to believe that the hotel records could generate an alibi for Roane, and Mr. Baugh was therefore obliged to make a reasonable investigation of them. *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. 2052 (explaining that attorney has duty to make reasonable investigation or to make reasonable decision not to investigate). We part company with the district court, however, on its conclusion that Mr. Baugh failed to fulfill this duty.

We review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective, *Smith v. Angelone*, 111 F.3d 1126, 1131 (4th Cir. 1997), and we defer to its findings of fact unless they are clearly erroneous. As the district court found, Mr. Baugh, in keeping with his obligation to investigate: (1) interviewed Cooley, who stated that she once accompanied Roane and Reavis to the Howard Johnson but could not

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extensive criminal record), plus one motel receipt, in someone else's name, placing Roane a mere two miles away from the murder scene, to create a reasonable probability that, but for the lack of such evidence, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

verify the date; (2) concluded that Cooley's ignorance of the date and apparent hostility would make her a poor witness; (3) thereafter contacted the Howard Johnson and asked for records of Linwood Chiles renting a room on the evening of January 12, 1992; (4) went to the hotel himself and attempted to locate the records; (5) limited his search to the name "Linwood Chiles," and searched only for records from January 12, 1992; and (6) found no record of Linwood Chiles being registered at the hotel on the evening of January 12, 1992. Roane Opinion at 5. At this point, Mr. Baugh made the strategic choice to focus on Roane's misidentification defense, with Gina Taylor as his lead witness.

The district court concluded that Mr. Baugh's investigation of the alibi was constitutionally insufficient because he "did not follow through and seek the records with the vigor demanded by the situation." *Id.* at 9. According to the court, "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* With all respect to the district court, we disagree.

As the Supreme Court has explained, a criminal defense lawyer possesses a duty to conduct a pretrial investigation that is "reasonable[ ] under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052; *see also Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). And the strategic decision of Roane's lawyer on the extent of his investigation into the alibi defense "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

judgments." *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052; *see also Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir. 2003) (same); *Tucker v. Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003) (same). We are obligated by law to make "every effort to avoid the distorting effects of hindsight," *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052, and we should evaluate Mr. Baugh's performance "from counsel's perspective at the time of the alleged error and in light of all the circumstances. . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986).

Applying these principles to this situation, Mr. Baugh's performance was constitutionally reasonable and thorough. He interviewed Carmella Cooley, who could not remember when she stayed at a hotel with Roane. He called the hotel and requested records of Linwood Chiles from the *only relevant night*—the night of the murder. And when that search was not fruitful, he went to the hotel and searched for the records himself. Only after this final step in his investigation did Mr. Baugh turn to and focus on Roane's misidentification defense. In these circumstances, we decline to act as a Monday-morning quarterback and second-guess Mr. Baugh's efforts, simply because we are now armed with more information and the benefit of hindsight.

Furthermore, the authorities relied upon by the district court miss the mark, involving situations in which a lawyer has failed to investigate a defense *at all* or has performed an investigation so minimal that no strategic reason could be given for the failure to investigate further. *See, e.g., United States v. Russell*, 221 F.3d 615, 621 (4th Cir. 2000) (finding ineffective representation when lawyer failed to investigate defendant's criminal record after defendant advised counsel

that his convictions had been overturned); *Hooper v. Garraghty*, 845 F.2d 471, 474-75 (4th Cir. 1988) (explaining counsel deficient in failing to investigate insanity defense, after learning from client, client's family, and prison psychologist of client's insanity); *Hoots v. Allsbrook*, 785 F.2d 1214, 1219-20 (4th Cir. 1986) (finding lawyer's decision not to interview eyewitnesses unreasonable); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985) (finding counsel ineffective in failing to seek evidence from witnesses when client claimed those witnesses committed crime). Unlike the circumstances underlying those decisions, this case does not involve a situation where counsel neglected to investigate, or where his investigation was so cursory that we can now —eleven years on and with the benefit of hindsight— declare it constitutionally unreasonable.

As the Sixth Circuit aptly explained in *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), what the lawyer did not miss is "just as (or more) important as what the lawyer missed." *Id.* at 342. Here, Mr. Baugh was diligent and highly effective in his representation of Roane during this litigation—he conferred with Roane, he investigated the crime scene, he located an eyewitness to the Moody murder who provided a physical description of a murderer dissimilar to Roane, he learned that Moody's mother had advised the police that another man had been searching for Moody hours before his murder, and he aggressively and professionally cross-examined the Government's witnesses. Mr. Baugh investigated the possible Moody alibi—a weak one at that—but when the investigation proved unfruitful, he put on a strong misidentification defense. According a "heavy measure of deference" to Mr. Baugh, as we must, his representation of Roane was not constitutionally ineffective.

We therefore reverse the vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven.

* * * * *

(2)

No. 04-1136

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES H. ROANE, JR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

PAUL F. ENZINNA
Counsel of Record
HEATHER M. MCCANN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The government's brief in opposition for the most part fails to address or misconstrues the arguments in the petition. First, the government fails to explain how the Fourth Circuit's harmless error analysis can be reconciled with this Court's holding in *Richardson* v. *United States*, 526 U.S. 813 (1999). Second, the government's contention that petitioner's *Richardson* claims are procedurally defaulted is incorrect. Third, the government misconceives petitioner's ineffective assistance of counsel claim, and incorrectly asserts that the Fourth Circuit properly deferred to the district court's factual findings.

I. Courts of Appeals Are Divided On The Proper Test To Apply To *Richardson* Errors

A. The Fourth Circuit's Ruling Conflicts With The Decisions Of Other Circuits And Misconstrues *Richardson*

The government does not dispute that, when reviewing a district court's failure to provide a unanimity instruction in violation of *Richardson* for harmlessness, some courts of appeals "have explicitly addressed the 'relatedness' of the predicate offenses" underlying a CCE charge, while others have "*not* independently assessed" whether the predicate offenses were sufficiently related to constitute a "continuing series" under 21 U.S.C. § 848(c). Br. in Opp. 21 (emphasis in original). Nevertheless, the government contends that there is no split in the circuits regarding how harmless error analysis applies to *Richardson* claims because "there is no indication that the relatedness of the predicate offenses was genuinely at issue in any of the cases in which relatedness was *not* independently assessed * * * ." *Id.* at 20-21.

The government, however, cites nothing in those cases suggesting that the relatedness of the individual violations was conceded or otherwise not in dispute. The decisions do not say that relatedness was not at issue or conceded by the parties. Nor do they suggest that the standard they establish, articulate, and apply is limited to cases in which the relatedness issue is conceded. Instead, they articulate and apply a test that omits—as the government concedes—any inquiry into whether the individual violations are related. *Id.* at 21. Simply put, the standard articulated and applied by the Fourth Circuit here (and by the Fifth and Tenth Circuits) does not address the "relatedness" or "series" aspect of Section 848 because the court of appeals assumed that, whenever a defendant was convicted on three or more of the underlying CCE offenses charged in the

indictment, the jury *necessarily* agreed both on the identity of the offenses in the series and that at least three of those offenses were sufficiently related. See Pet. 13-17.

That standard, and the assumption underlying it, is contrary to this Court's decision in *Richardson*. *Richardson's* fundamental holding is that a jury in a Section 848 prosecution "must unanimously agree *not only* that the defendant committed some 'continuing series of violations' *but also* that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" 526 U.S. at 815 (emphasis added). The Court explained that "a jury in a criminal case cannot convict unless it unanimously finds that the government has proved *each* element." *Id.* at 817 (emphasis added). In this context, the "continuing series of violations" required to convict under Section 848 encompasses *two* elements: (1) a "series" of related offenses and (2) the "violations" comprising that series. *Id.* at 817-818. Where the *Richardson* instruction is omitted at trial, the mere fact that a jury returns guilty verdicts on more than three of the predicate offenses charged in the indictment does not guarantee that the jurors also unanimously agreed on *which* three or more crimes were part of the series *or* that those three or more crimes were sufficiently related to constitute the "continuing series."

This Court explicitly recognized as much in *Richardson* itself, explaining that its holding "will make a difference where, as here, the Government introduces evidence that the defendant has committed *more underlying drug crimes than legally necessary* to make up a series." *Id.* at 818 (emphasis added). That makes sense. Where the court fails to provide a *Richardson* instruction, the jury's conviction of the defendant on more than three predicate offenses means only that each juror concluded that *some* of those offenses were sufficiently related. It does not mean that the jury unanimously agreed on *which* predicate offenses were suf-

ficiently related, as required under *Richardson*. The Fourth Circuit's approach (along with that of the Fifth and Tenth Circuits) ignores that distinction, contradicts this Court's observation in *Richardson*, and effectively reads the "continuing series" element out of the statute. In effect, the Fourth Circuit held that *Richardson* makes no difference in cases involving convictions on more than three predicate offenses—precisely opposite the conclusion this Court reached in *Richardson*. The need to ensure faithful adherence to *Richardson*, and the interest of restoring uniformity in circuit law, both weigh heavily in favor of further review.

B. *Richardson* Violations Are Properly Considered Structural Defects

The government relies on prior denials of certiorari and the holdings of other courts of appeals to argue that this Court should not decide the question this Court explicitly reserved in *Richardson*—namely, whether the failure to give a unanimity instruction in a CCE case is a structural defect requiring automatic reversal. *Richardson*, 526 U.S. at 824. But this Court's denial of other petitions for a writ of certiorari raising this issue means only that the Court declined to review those cases; it is hardly precedent that requires denial in all cases raising the same issue in perpetuity. This Court, moreover, often delays review to allow issues to percolate among the lower federal courts, or because particular cases have undesirable features that may be impediments to further review. As this case demonstrates, the courts of appeals continue to overlook the structural significance of *Richardson* error in our system of criminal justice. And this case provides the proper vehicle for review of this important and recurring issue.

C. The Government's Assertion That Petitioner Forfeited His *Richardson* Claim Lacks Merit

The government asserts that, because petitioner forfeited his *Richardson* claim by failing to raise it in the district court during trial, his claim is subject to plain-error review. Br. in Opp. 20. That assertion is incorrect for two reasons and irrelevant for a third. First, to the extent the *Richardson* error is structural, it is not subject to forfeiture. Second, the court of appeals' decision below did not apply a plain-error standard. It simply rejected the claim on the merits. Pet. App. 20a. Nothing requires this Court to review the propriety of that approach; at most, that is an issue for remand.

Third, and most important, the issue in this case—whether the court of appeals applied an incorrect test in evaluating whether *Richardson* error was harmless—is identical whether the *Richardson* error is being reviewed for plain-error or ordinary-error. As explained above, the court of appeals applied an incorrect standard in assessing whether the jury necessarily agreed (or if properly instructed would have agreed) both on the identity of the criminal acts making up the "series" of violations *and* that those criminal acts were sufficiently "related" to constitute a series. The standard the Fourth Circuit applied was incorrect (and conflicts with the approach of other circuits) whether harmlessness is evaluated for purposes of plain-error or ordinary-error. As a result, any dispute over application of the plain- versus ordinary-error standards has no bearing on the propriety of review in this Court.[1]

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[1] The government also asserts that, under the plain error standard, this error does not affect "the integrity or public reputation of judicial proceedings." Br. in Opp. 23. At most, that is an issue for the court of appeals following any remand. In any event, allowing a conviction to stand without the jury or a court having considered *all*

II. This Court Should Clarify The Standard Of Deference Accorded To District Court Factual Findings On Ineffective Assistance Of Counsel Claims

The government misinterprets petitioner's argument with respect to ineffective assistance of counsel. Petitioner acknowledges that whether counsel's performance was constitutionally reasonable is a mixed question of law and fact reviewable under a *de novo* standard. The Fourth Circuit, however, did not accord proper deference to the district court's *factual* findings, which were entitled to deference unless clearly erroneous. The Fourth Circuit's conclusion that defense counsel performed reasonably under the circumstances cannot be sustained under the facts of this case. Particularly given the gravity of the consequences here—the execution of an individual for a murder for which he had a credible alibi that the jury never heard—the ineffective assistance of counsel claim warrants further review.

A. The Fourth Circuit Improperly Invaded The District Court's Province

The Fourth Circuit properly set forth the standard applicable to review of ineffective assistance cases; it would "review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective," and "defer to its findings of fact unless they [were] clearly erroneous." Pet. App. 40a. But the Fourth Circuit failed to apply that standard to the facts of this case. The district court found that counsel had "substantial information" indicating "that Roane's claim that he was at a hotel at the time of the Moody murder was credible," including (a) an "apparently disinterested" witness who asserted that Roane was not the killer; (b) Roane's "detailed" account that he was miles

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of the elements surely affects the public reputation and integrity of the judicial process—particularly in a capital case.

away in a hotel room at the time of the murder, that Carmela Cooley and Linwood Chiles had driven him to the hotel, and that Chiles had registered and paid cash for the room; (c) Cooley's interview, which "corroborated the details" of Roane's alibi; and (d) Roane's candor with respect to other charges, which "assured counsel that the alibi was true." Pet. App. 55a. The district court also found that, armed with that information, Baugh "had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story." *Ibid.* The Fourth Circuit agreed with those findings, holding that "Mr. Baugh was therefore obliged to make a reasonable investigation" of the hotel records. *Id.* at 40a.

The district court then found that counsel's review of the records was "very limited in scope and duration," despite the lack of any suggestion that "constraints of time or resources played a part in [counsel's] decision to terminat[e] his search for records corroborative of Roane's alibi." *Id.* at 41a, 55a. Without finding clear error in any of those facts, the Fourth Circuit nevertheless concluded that counsel's investigation was reasonable. The court of appeals stated that "defense counsel had reasonably confined his search to records for Linwood Chiles for January 12, 1992—the night of the Moody murder, and thus 'the only relevant night'—and had reasonably focused his defense on a misidentification theory once his properly focused records search was unsuccessful." Br. in Opp. 27-28 (citing and quoting Pet. App. 42a). If true, one of three things follows: (1) Baugh confined his search to January 12, 1992 and failed to uncover the registration card for "Larry Chiles" *on that night*—a card that an investigator would find six years later with minimal effort; (2) Baugh found the registration card, but failed to realize its significance; or (3) Baugh never actually looked at the records for that date. Under either of the first two scenarios, Baugh's conduct falls below the objective reasonableness standard because Roane spe-

cifically told Baugh that Chiles had registered for the hotel room on the night of January 12. Under the final scenario, Baugh's conduct was objectively unreasonable because he failed even to look at that date or to subpoena the hotel records, as the district court found. *Id.* at 56a. The unreasonableness of any of those errors, moreover, is compounded by the fact that the Moody murder—the only one petitioner ever denied committing (and credibly so)—was the *only* capital count for which Roane received the death penalty. Given the seriousness of counsel's error, petitioner's claim warrants review.

B. Petitioner Was Prejudiced

For similar reasons, the government's contention that petitioner cannot demonstrate prejudice is unfounded. The district court—the same district court that observed trial proceedings—specifically found that petitioner in fact was prejudiced by his counsel's inadequate investigation. Pet. App. 57a-59a. In particular, the district court found, as a matter of fact, that had Baugh located the hotel records corroborating Roane's alibi—a registration card for the night of January 12, 1992 under the name "Chiles, Larry," as well as a receipt for that same night indicating that Chiles paid cash for the room—petitioner "would have testified" in his own defense, asserting "that he was at the hotel at the time of the [Moody] murder." *Id.* at 57a. Roane's alibi "would have been somewhat corroborated by the introduction of the hotel records." *Ibid.* When viewed against the government's case, "which was neither undisputed nor overwhelming," and hinged primarily on two eyewitnesses whose testimony was at least partly impeached at trial, the additional evidence was "of sufficient credence to create a reasonable probability that Roane would have been acquitted of the charges related to the murder of Douglas Moody." *Id.* at 58a. That finding is

further supported because the alibi evidence would have bolstered petitioner's misidentification defense. *Ibid.*[2]

C. *Rompilla* Weighs In Favor Of Further Review

Finally, the government argues that this Court's recent decision in *Rompilla* v. *Beard*, 125 S. Ct. 2456 (2005) does not alter the ineffective assistance of counsel analysis. According to the government, this case is unlike *Rompilla* because "[t]his case does not involve a failure to 'look at a file [that defense counsel] knows the prosecution will cull for aggravating evidence,' much less a file that was 'sitting in the trial courthouse, open for the asking.'" Br. in Opp. 30 (citing *Rompilla*, 125 S. Ct. at 2467). But the government overlooks the fact that, like *Rompilla*, the hotel records in this case contained—and defense counsel should have known they would contain—evidence that would support petitioner's defense. And those records were, in fact, "sitting * * * open for the asking," as demonstrated by the district court's factual finding that Baugh could have located the records if he had only "filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." Pet. App. 56a.

"Reasonable efforts certainly included obtaining the * * * readily available" hotel records in this case. *Rompilla*, 125 S. Ct. at 2465. Nevertheless, Baugh conducted only a "very limited" review of the hotel records, despite the fact that neither "constraints of time or resources played a part

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[2] As the government points out in its Brief in Opposition, footnote 15 of the Court of Appeals' decision was inadvertently omitted from the Appendix filed with the Petition For A Writ Of Certiorari. Br. in Opp. 17a n.9. Petitioner apologizes for any inconvenience it has caused, and appreciates the Solicitor General for having included the inadvertent omission in the appendix to its Brief in Opposition.

in [counsel's] decision to terminate his search for records corroborative of Roane's alibi." Pet. App. 56a. That limited search cannot constitute "reasonable efforts" given the potentially critical nature of the hotel records to petitioner's guilt phase, counsel's strong reasons for believing such records existed, see pp. 6-7, *supra*, and the minimal effort that was required to locate them more than six years later. Accordingly, the Court should grant the petition and review the ineffective assistance of counsel claim on the merits. At a minimum, it should grant the petition, vacate the court of appeals' judgment, and remand the case (GVR) for reconsideration in light of *Rompilla*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative and at a minimum, the Court should grant the petition, vacate the court of appeals' judgment, and remand the case for reconsideration in light of *Rompilla*.

Respectfully submitted.

PAUL F. ENZINNA
Counsel of Record
HEATHER M. MCCANN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioner

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